INSTITUTES OF NATURAL LAW.



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INSTITUTES
OF
NATURAL LAW

Being the ſubſtance of a
COURSE of LECTURES
ON
Grotius de Jure Belli et Pacis
READ IN S. JOHNS COLLEGE
CAMBRIDGE,

By T. RUTHERFORTH. D.D. F.R.S.
Archdeacon of Essex,
and Chaplain to her Royal Highness
the Princess Dowager of Wales.

K

VOLUME the FIRST

In which are explaned
The rights and obligations of mankind
conſidered as individuals.

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BRITISH MUSEUM

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TO THE READER.

THE authors diſtance from the preſs has occaſioned ſeveral errors to paſs uncorrected. As theſe, which follow, are the principal ones, the reader is deſired to correct them with his pen, or to remember them, when they occur: and it is hoped that the reſt are ſuch, as will be eaſily overlooked and pardoned.

Pag. 1. *Title of chap. wanting*—*Of law in general. lin.* 14 *after* the *inſert* word. *pag.* 6. *lin.* 2 *for* colleges *read* college. *pag.* 14. *lin.* 17 *for* who *read* as. *pag.* 16. *lin.* 29 *for* to us. Since *read* to us; ſince. *pag.* 19. *lin.* 3 *for* are *read* is. *lin.* 32 *for* them *read* thoſe. *pag.* 23. *lin.* 12 *for* common *read* roman. *pag.* 25. *lin.* 8 *of contents for* —*corporal or incorporal*—*read*—*corporeal or incorporeal. pag.* 26. *lin.* 22 *blot out* the. *pag.* 28. *lin.* 9 *for* an *read* any. *pag.* 29. *lin.* 13 *for* charity *read* chaſtity. *p.* 32. *lin.* 26 *blot out* of. *pag.* 40. *lin.* 21 *for* belong *read* belong to. *pag.* 46. *lin.* 19, 20, 28 *for* Jubal *read* Jabal. *pag.* 57. *lin.* 26 *after* attended *inſert* to. *pag.* 67. *lin.* 18 *for* of uſe *read* uſe of. *pag.* 83. *lin.* 11 *for* mats *read* nets. *pag.* 89. *lin.* 16 *for* right *read* demand. *pag.* 138. *lin.* 6 *blot out* ſome. *pag.* 142. *lin.* 13 *for* theſe are *read* are theſe. *pag.* 157. *lin.* 31 *for* perſon *read* perſons. *pag.* 189. *lin.* 24 *for* come *read* comes. *pag.* 201. *lin.* 26 *for* ſhould *read* would. *pag.* 210. *lin.* 1 *for* have *read* to have. *pag.* 327. *lin.* 4 *for* actually *read* naturally. *pag.* 371. *lin.* 12 *for* as well *read* as well as. *pag.* 375. *lin.* 23 *for* his *read* this.

INSTITUTES OF NATURAL LAW.

CHAPTER I.

I. *What is meant by a law.* II. *Permiſſions are not laws.* III. *In what reſpect they may be conſidered as laws.* IV. *Why they have been thought to be laws.* V. *Laws either natural or voluntary.* VI. *Cauſe of obligation to obſerve natural laws is foreign to our preſent enquiry.* VII. *A ſhort account of the cauſe of obligation.* VIII. *Voluntary laws either divine or human.* IX. *Divine voluntary laws.* X. *Difference between law of nature and divine poſitive laws.* XI. *Human voluntary laws of three ſorts. Civil law what.* XII. *Human laws of leſs extent than civil law.* XIII. *Law of nations.*

I. A Law[a] is a rule to which men are obliged to make their moral actions conformable. The word law has indeed a much more extenſive ſignification: all rules, from which any beings whatſoever either will not, or cannot, or ought not to deviate, are ſo many laws to them. The rules, which God has ſet to himſelf to work by; the rules, which brute creatures are led by their inſtinct to obey; and the rules, which inanimate matter in its motions and operations cannot but obſerve, are uſually called the laws of their ſeveral

What is meant by a law.

[a] Grot. Lib. I. Cap. I. §. IX.

natures. But ſince it is not our buſineſs, in the follow-
ing work, to enquire into the rules, which God, before
all ages, has ſet down to himſelf, for himſelf to work
by; or into thoſe, which the inſtinct of brute creatures
impoſes upon them, or into thoſe, which neceſſarily de-
termine the motions and operations of inanimate mat-
ter; but into thoſe only, which men are bound to ob-
ſerve; it was proper, in defining the word law, to re-
ſtrain it to this ſenſe. Neither are all the actions of men
ſubject to the natural law, which we are enquiring af-
ter; but thoſe only, which are called moral actions;
that is, thoſe only, in which men have knowledge to
guide them, and a will to chuſe for themſelves. This
is the reaſon for reſtraining the law ſtill farther, by
defining it to be a rule for the moral actions of men.
It was neceſſary likewiſe to include obligation in our
notion of a law, and to define it to be a rule, which
men are obliged to obſerve; becauſe all the rules, which
men obſerve, even in their moral actions, are not laws.
Counſel, or advice, which they may follow or neglect
at their own diſcretion; rules of convenience or prud-
ence, which they may obſerve or not, as their own in-
clinations lead them; if they are ever called laws, are
called ſo improperly.

Permiſſions are not laws.

II. By making obligation a neceſſary part in our no-
tion of a law, all [b] permiſſions are, as they ought to be
excluded from being laws. Tho' permiſſions may come
from the maker of a law, and may be eſtabliſhed by
his authority, yet they are rather negations of law than
acts of it: inſtead of being operations of the law, they
are checks upon its operation.

[b] Grot. Lib. I. Cap. I. §. IX.

Per

Permiſſions are of two ſorts, they ariſe either from the ſilence of the law, or from its expreſs declarations. All laws are underſtood to permit ſuch actions as they are ſilent about: we are permitted to do whatever the law does not forbid; we are permitted to neglect whatever it does not command. There can be no queſtion, whether ſuch permiſſions as theſe are to be called laws: for certainly the ſilence of the law can never come within the notion of law. And as to the other ſort of permiſſions, thoſe which ariſe from expreſs declarations of the law; what are they but declarations, that the law is not deſigned to extend to the privileged caſe? Mankind, if they were under no law, would be at full liberty to act in what manner they pleaſed. But ſuppoſe a law to be made commanding them to do this, or that; the liberty of all, who are ſubject to the authority of ſuch law, is then reſtrained, and they are obliged to act as the law preſcribes. Suppoſe farther the ſame law to declare, that ſuch particular perſons, or that perſons in ſuch particular circumſtances, are permitted to do otherwiſe; the effect of ſuch a declaration is, that the privileged perſon, or that the perſons in the privileged circumſtances, are left in the ſame condition, as if no law at all had been made: they are, notwithſtanding the law, at liberty to act in what manner they pleaſe. And it is not eaſy to imagine with what propriety ſuch a permiſſion can be called a law, as leaves them at their full liberty, and places them in the ſame condition, that they would have been in, if the law had done nothing either one way or the other. Such a permiſſion comes indeed from the law-maker, and is eſtabliſhed by his authority. But then it is plane how his authority operates. Its operation is to check the obligation of his

law, and to prevent its extending to ſuch perſons, or to ſuch caſes as it would have extended to, if he had not checked it.

From what has been already ſaid, it will appear, that, tho' we diſtinguiſh between permiſſions, which ariſe from the ſilence of the law, and permiſſions, which ariſe from the expreſs declarations of it; yet both of them are nearly the ſame in their effect. The principal difference between them is in their extent. All men are at liberty to act as they pleaſe, where the permiſſion ariſes from the ſilence of the law. But they only have this full liberty, to whom the permiſſion is granted by the law, where the permiſſion ariſes from its expreſs declaration. Perhaps the following inſtance may help to make this matter more intelligible. Suppoſe the local ſtatutes of any College in either of our Univerſities neither to have commanded nor forbidden the fellows of ſuch college to enter into holy orders, but to have been wholly ſilent upon this head. Every one will ſee, that thoſe fellows are permitted to act in this reſpect, as they pleaſe, and are at liberty either to enter into holy orders or not, at their own diſcretion. The founder of the college, or other perſon, who has a right to change their ſtatutes, alters his mind, and enjoins, that they ſhall all be in holy orders at a certain age, under the penalty of forfeiting their fellowſhips. They are then no longer at liberty to chuſe for themſelves, but muſt either loſe their fellowſhips, or enter into holy orders. After ſome experience this law is found inconvenient, and the ſame authority, which eſtabliſhed it, repeals it. The fellows are then at liberty again as they were at firſt; they are permitted either to enter into holy orders or not, juſt as they pleaſe. And this permiſſion is

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planely owing, not to any new law, but to a repeal of hat, which was formerly made. It ariſes indeed from n act of the lawmaker; but it is from ſuch an act as nly makes void what he had done before. But ſuppoſe him, inſtead of having repealed his former law, o have granted a diſpenſation to two of the fellows to ontinue laymen, if they pleaſe. Such a diſpenſation is permiſſion ariſing from the act of the lawmaker: but ve cannot with any propriety call it a law, in reſpect f thoſe two of the fellows, to whom it is granted. Its ffect is planely a repeal of the law in reſpect of them: nd if a repeal of a law, where it is univerſal, cannot e called a law; there is no reaſon why it ſhould be alled ſo, where it is partial. A permiſſion to all the ellows, ariſing from the ſilence of the ſtatutes, is planey no law. A permiſſion to all the fellows, ariſing from he repeal of the ſtatutes, is planely no law. The only difference between either of theſe caſes, and the caſe of permiſſion to two of the fellows, is, that only theſe wo enjoy that liberty in this caſe, which all of them would have enjoyed in either of the other. And it will, apprehend, be neceſſary to find out ſome other difference beſides this, before any ſatisfactory reaſon can be hewn, why permiſſions ariſing from the original ſilence r total repeal of the law, are not laws; but permiſſions ariſing from an expreſs diſpenſation or a partial repeal of it, are to be looked upon as laws.

In what reſpect permiſſions may be conſidered as laws.

III. But tho' permiſſions do not operate as laws, in reſpect of thoſe perſons, in whoſe favour they are granted; yet they have the operation of laws, and ought to be conſidered as laws, in reſpect of others, who are bound not to hinder thoſe perſons from the full enjoyment of that liberty, which ſuch permiſſions allow.

Thus, in the inſtance juſt now made uſe of, the governors of the colleges are bound by the diſpenſation granted to two of their fellows from entering into holy orders, to ſuffer theſe two fellows quietly to enjoy their places or fellowſhips, notwithſtanding the general ſtatute obliging the reſt of them to be in holy orders at a certain time, under the penalty of a forfeiture; tho' the fellows, who are thus privileged, ſhould continue laymen beyond the time ſo limited. Permiſſions therefore, tho' they are not laws in one view, are laws in another view. In reſpect of thoſe perſons, to whom or in whoſe favour they are granted, they are checks upon the law: in reſpect of others, who, if no ſuch permiſſion had been granted, might have lawfully hindered theſe perſons in the exerciſe of that liberty, which it allows, they are acts of the law. They are not laws as far as they allow a liberty of action: they are laws as far as they include the notion of obligation.

Why permiſſions have been thought to be laws.

IV. One reaſon why permiſſions, even in reſpect of thoſe perſons, who claim a liberty of acting in virtue of them, have been miſtaken for laws, has probably been that where they ariſe from expreſs declarations of the law, they are eſtabliſhed by the authority of the lawmaker. But that his eſtabliſhment of them will not be ſufficient to give them the nature of laws will be evident, upon recollecting in what manner his authority operates in their eſtabliſhment. It operates only ſo as to check itſelf, and to hinder the law from extending ſo far as it would have extended, if he had not granted the diſpenſation or privilege. And it may be queſtioned, whether a privilege or permiſſion, in this view of it, can be properly ſaid to be eſtabliſhed: unleſs we mean, that by the grant of ſuch privilege the liberty of

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thoſe perſons is eſtabliſhed, which the law would have taken away, unleſs the privilege had been granted.

Another reaſon, why permiſſions have been miſtaken for laws, is that privileges and rights are derived from them. And ſince privileges and rights are ſuppoſed to be poſitive things, it is imagined, that permiſſions, upon which they are founded, muſt be looked upon as poſitive acts, and not as mere negations of law. But then we muſt obſerve, that if there was no law at all; there would be no difference between privileged perſons and others; all men would be equally at liberty to act in the ſame manner. It is therefore the reſtraint, which the law has laid upon others, and not the grant of any thing poſitive to the privileged perſons, which puts the difference between theſe perſons and others. And a privilege, in this view of it, can no otherwiſe be conſidered as a poſitive thing, than as it is a reſerve of that liberty in favour of the privileged perſons, which the law has taken away from others not privileged. But ſuch a reſerve as this is plainly no act of the law; it is only a check upon it, and hinders it from acting. Many of our rights, it muſt be allowed, are derived from permiſſions. But this can be no reaſon for eſteeming permiſſions to be poſitive acts of the law: unleſs the ſilence of a law can be called a poſitive act of it. Since as many of our rights are derived from permiſſions, which ariſe from the ſilence of the law, as from permiſſions, which ariſe from its expreſs declarations. A right is indeed nothing more than a liberty of doing certain actions, or of poſſeſſing certain things conſiſtently with the law. We have therefore a right to do ſuch actions as the law does not forbid us to do, and to poſſeſs ſuch things, as the law does not forbid

us to poſſeſs. And it ſeems impoſſible for any one to conceive, that the laws not forbidding us to do an action, or to poſſeſs a thing, ſhould be an act of the law. This is the caſe, where our rights are founded upon permiſſions ariſing from the ſilence of the law: and it is much the ſame, where they are founded upon what are called poſitive grants, that is, upon ſuch permiſſions, as the law expreſsly declares. An expreſs declaration of what the law allows is no more than an expreſs declaration of what it does not forbid. In one view indeed a permiſſion, upon which any right is founded, may be looked upon as an act of the law: tho' in reſpect of them, whoſe right it is, the permiſſion is only a negation of law, yet in reſpect of others it operates as a law: becauſe it reſtrains all others from interrupting them in the free enjoiment of what is ſo permitted.

Laws either natural or voluntary.

V. [c] Laws are divided into two ſorts, natural and voluntary. Natural laws are thoſe, which mankind are obliged to obſerve from their nature and conſtitution. Voluntary laws, or, as they are ſometimes called, poſitive laws, are thoſe, which mankind are obliged to obſerve by the immediate will and appointment of a ſuperiour.

Cauſe of obligation to obſerve natural law is foreign to our preſent enquiry.

VI. As it is the principal deſign of the following treatiſe to trace out the rules, which mankind are obliged to obſerve from their nature and conſtitution; there does not ſeem to be any great neceſſity for entering into the queſtion concerning the cauſe of our obligation to obſerve theſe rules; a queſtion upon which moraliſts are ſo much divided in their opinions. However they may differ about the cauſe of obligation, they are agreed

[c] Grotius *ibid.*

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about the law, to which we are obliged; whilſt they diſpute about the reaſon of duty, they concur in eſtabliſhing the ſame rules of duty. The moraliſts of one ſect derive our obligation to obſerve the law of nature from inſtinctive affections, or an innate moral ſenſe. Thoſe of another ſect maintain, that all our obligations of this ſort ariſe from certain abſtract relations or fitneſſes of things. A third ſect are of opinion, that we cannot be ſteadily and conſtantly obliged to the obſervance of that law, but from the aſſurance of being made happy, for obſerving it, by the will and appointment of God. And a fourth ſect think it neceſſary to join all theſe principles together, in order to render the obligation perfect. But all theſe different ſects agree in contending, that the law of nature, which we are obliged to obſerve, preſcribes piety towards God; juſtice and benevolence in reſpect of mankind; and chaſtity and temperance in reſpect of ourſelves. But as the rules of duty are the proper ſubject of our preſent enquiry, and all moraliſts are agreed about theſe rules, however they may differ about the cauſe, which obliges us to the obſervance of them; we might paſs over this queſtion entirely, without being liable to be charged with neglecting what neceſſarily belongs to our ſubject: or if we ſay any thing about it, thoſe moraliſts, who are not of the ſame opinion with us, muſt own, that the proper ſubject of the following treatiſe is not affected by it.

A ſhort account of the cauſe of obligation.

VII. But though it is not neceſſary to ſpeak at large concerning the cauſe of moral obligation, and to enter minutely into the diſputes, which have been raiſed upon that head; yet it may not be improper to ſay ſomething about it. I ſhall therefore endeavour to ſhew, in as few words as I can, for what reaſon we are obliged to the duties

duties of piety towards God, of juſtice and benevolence in reſpect of mankind, of chaſtity and temperance in reſpect of ourſelves. It is, I ſuppoſe, an undoubted truth, that all men are deſirous of happineſs. And I ſhall farther take it for granted, that when any practice appears to be ſo connected with our happineſs, that we cannot obtain the one without following the other, we are then as ſtrongly obliged to that practice, as we can be. Whatever rules therefore are, by our own nature and the conſtitution of things, made neceſſary for us to obſerve, in order to be happy, theſe rules are the law of our nature. Now man, as an individual, unconnected with the creatures of his own ſpecies, not joined with them in a common intereſt, having no other proviſion or conveniency but what his own labour could produce, having no prudence but his own to contrive for himſelf, and having no ſtrength but his own to defend him, would be unable to obtain ſuch a degree of happineſs, as his nature prompts him to deſire, and much more unable to obtain ſuch a degree, as his nature is capable of. It is therefore the law of his nature, that he ſhould live in ſociety with others of his own ſpecies: by which I do not mean, that he ſhould merely live in company with them, as many brute creatures are obſerved to herd together; but that he ſhould join with them in a common intereſt, that he ſhould bind himſelf to them in ſuch a manner as to labour with them for a general good. For without ſuch a connection of intereſts, he cannot make uſe of a joint or common wiſdom to contrive for his own good, nor of a joint or common ſtrength to ſecure himſelf in the poſſeſſion of it. So that although his own particular happineſs be the end, which the firſt principles of his nature teach him to pur-

purſue; yet reaſon, which is likewiſe a principle of his nature, informs him, that he cannot effectually obtain his end without endeavouring to advance the common good of mankind; but muſt either be contented to enjoy his own happineſs, as a part of the general happineſs, or not enjoy it at all.

When he diſcovers farther, that there is a God, who made and governs the world, to whoſe power he owes his being, and to whoſe goodneſs he owes all the happineſs, that he either does or can enjoy; and when he learns beſides, either by the uſe of his reaſon, or by expreſs declarations from the maker and governour of all things, that he is not to ceaſe to exiſt, when he paſſes out of this preſent life, but that his being will be continued to him in another; the ſame deſire of happineſs, which obliged him to purſue a general good, and to keep his intereſts by this means united to the common intereſts of his ſpecies, will oblige him to obſerve all theſe rules in his moral conduct, which he finds to be neceſſary, in order to ſecure the favour of his maker, and his own welfare in the life after this. He will plainly underſtand, that the moſt effectual way to ſecure the latter point, is to ſecure the former, that he is moſt likely to obtain this future happineſs, by putting himſelf under the protection of that almighty Being, who is the diſpoſer of all things. Nor can he have any hope of engaging the protection of God, but by endeavouring to pleaſe him, or by obeying his will, as far as he can diſcover what his will is. But ſince, from a view of what is before him, it appears, that God has made his nature and conſtitution ſuch, as requires him, if he would be happy here, to work for a general good, or for the common intereſt of his ſpecies; the moſt reaſon-

ſonable concluſion is, that God, who made his nature and conſtitution what it is, expects him thus to work; and that, by thus endeavouring to do the work, which God expects him to do, he takes the moſt effectual method of ſecuring whatever happineſs can be hoped for hereafter.

But beſides the general deſire of happineſs, he finds within himſelf certain appetites, which lead him to ſome particular ſorts of pleaſure, and that a part of his happineſs, whilſt he is here, conſiſts in the gratification of theſe appetites. But then he finds likewiſe, that, if he indulges himſelf to exceſs in ſuch pleaſures, the exceſs is attended with pains and diſeaſes, and that if he gives himſelf up to thoſe pleaſures, he becomes either uſeleſs or hurtful to his ſpecies. From either of theſe diſcoveries he may collect, that he cannot be as happy, as he naturally deſires to be, or that he cannot obtain his greateſt good, unleſs he takes care to reſtrain his appetites within proper bounds. For ſince the pain and diſeaſes, which attend the too free indulgence of them, ariſe from his nature and conſtitution, exceſſes of this ſort are contrary to his nature and conſtitution, and conſequently are contrary to the will of that Being, who made his nature and conſtitution what they are. And ſince the ſame exceſſes interfere with the common good of his ſpecies, by making him either uſeleſs or hurtful, they are upon this account likewiſe contrary to his nature and conſtitution, which he finds to be ſuch, that he cannot obtain his own particular happineſs without endeavouring to promote the common happineſs of his ſpecies.

Upon the whole, mankind are naturally deſirous of making themſelves as happy as they can; and whatever

rules

rules are by their nature and conſtitution made neceſſary for them to obſerve, in order to obtain this greateſt good, are the law of their nature. And theſe rules have been ſhewn to conſiſt, firſt, in piety and reverence towards God, who is the maker and diſpoſer of all things; ſecondly, in juſtice and benevolence towards one another, or in working for a common intereſt, by taking care to do no harm, and by endeavouring to do good; and, thirdly, in reſtraining their appetites by chaſtity and temperance, ſo as neither to hurt themſelves nor others, by the improper indulgence of them.

In tracing out the obligation ariſing from the law of nature, to obſerve theſe duties, I have taken the expectation of a life after this into the account; without conſidering, whether we come to the knowledge of ſuch a life by the uſe of our reaſon, or by ſome expreſs revelation, which God has made to us. Nor do I think it neceſſary to enter here into any debate upon this head; becauſe by whatever means we are informed of this fact, that there will be a future life, ſuch a life is equally a part of our nature, and of the conſtitution of things; and all the conſequences relating to our practice, which can be deduced from it, are equally the laws of our nature. It may perhaps be urged, that the law of nature is a law, which reaſon diſcovers to us, and that upon this account revelation cannot fairly be made the foundation of it. But whoever is diſpoſed to make ſuch an objection as this, ſhould conſider, in what ſenſe reaſon is ſaid to diſcover the law of nature: it does not diſcover all the facts from whence it deduces this law. Many of them are learned by our own experience, and many more depend upon the experience of other men, and are conveyed to us by their teſtimony. Whoever would

would be truly and fully informed of the nature and conſtitution of the human ſpecies, muſt make uſe of theſe means: and after he is thus informed of the facts his reaſon traces out from thence the rules, which ſuch a nature and conſtitution obliges mankind to obſerve. The uſe of reaſon, in tracing out thoſe rules, will, as far as I can ſee, be preciſely the ſame, whether he is informed of the facts relating to the nature and conſtitution of man, by his own experience and the teſtimony of other men, or whether he joins to theſe helps the much ſurer teſtimony of God.

Voluntary laws either divine or human.

VIII. [d] As voluntary laws are rules preſcribed to mankind, by the immediate authority of a Superiour; they muſt neceſſarily be either divine, or human: becauſe the only ſuperiours, that we know of, are either God who is the author of our being, or ſuch of our own ſpecies, who have a right to direct our conduct.

Divine voluntary laws.

IX. [e] Divine voluntary laws are ſuch rules, as we are obliged to obſerve by the immediate command and authority of God. Theſe laws are either of partial or of general obligation; they are either ſuch as oblige only one particular people, or ſuch as oblige all mankind. We know of but one inſtance of a divine voluntary law, which was confined to a ſingle people; and that is the law, which God gave to the Iſraelites by Moſes. It is evident, that the poſitive parts of this law were never obligatory upon any people, except the Iſraelites: both becauſe the law is addreſſed to them only; and becauſe the principal obſervances, which it enjoyned, and many of the rewards, which it promiſed, were confined to the country, where they lived. A voluntary law can oblige no farther than the lawmaker intended,

[d] Grot. *ibid.* §. XIII. [e] *ibid.* §. XV. XVI.

ended, that it ſhould oblige: becauſe all the authority, hat it has, is derived only from his will and intention: o that wherever this will or intention ſtops, the obliga- ion of the law muſt ſtop with it. Now the intention f God, in giving the Moſaic law, does not appear to ave extended beyond the Iſraelites; for the law is ad- reſſed to them alone. Hear O Iſrael, ſays the legiſla- or, the Lord thy God is one Lord. And as the inten- ion of the lawmaker thus confined it to that one peo- ple, ſo the matter of the law and the ſanctions of it are, in many inſtances, ſuch as confine it in the ſame manner. Some of the feaſts, which it appoints, could not be celebrated; ſome of the ſacrifices, which it com- mands, could not be offered; ſome of the ceremonies, which it preſcribes, could not be obſerved, at any place, except at Jeruſalem. The promiſes of living long in the land, which God had given them, the promiſe, that when all their males went up to Jeruſalem three times in a year, none of their neighbours ſhould invade their country, the general promiſes, that God would bleſs them more than any people, are all of them in their own nature limited to the Iſraelites; and ſome of them are limited not only to the Iſraelites, as a particu- lar people, but as a people ſettled in that particular country.

As this law was never obligatory upon any other nation, beſides the Iſraelites, ſo, ſince the preaching of the Goſpel, it is not obligatory upon them. This was expreſsly declared by the council of the apoſtles at Je- ruſalem, and is frequently repeated by St. Paul in moſt of his epiſtles. We are to obſerve however, that the Moſaic law may be diſtinguiſhed into three parts; that many of its precepts are purely political, and were de-

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ſigned to regulate and eſtabliſh the civil government of the Iſraelites; that many of its precepts are ceremonial and were deſigned to ſettle the outward forms of religious worſhip; but that ſome of its precepts are moral, and are only parts of the law of nature. Now whilſt we affirm the Moſaic law to have been never obligatory upon any beſides the Iſraelites, and not to be obligatory at preſent even upon them; we muſt remember, that the moral precepts of it did always oblige, and ſtill continue to oblige all mankind; not becauſe they are parts of the Moſaic law, but becauſe they are tranſcripts of that natural law, which was, and always will be of univerſal obligation to all men, as being derived from their nature and conſtitution.

Whatever poſitive laws were given either to Adam or to Noah, as the common parents of all mankind, would be of univerſal obligation, if we could come to the knowledge of them: becauſe the commands of God to them, as the repreſentatives of the ſpecies, one at the creation, and the other after the flood, neceſſarily extend to that whole ſpecies, which they repreſented.

All ſuch poſitive laws, as are contained in the Goſpel, are likewiſe of univerſal obligation: becauſe the author of it, and they who firſt preached it, by his appointment and under his direction, declare, that all men are obliged to receive it.

There does not ſeem to be any occaſion to prove, that we are obliged to obſerve ſuch poſitive rules, as God is pleaſed to preſcribe to us. Since his authority over us, and his power to make us happy or miſerable, are ſuch apparent and effectual cauſes of obligation, that the moſt ſlight obſerver cannot want to have them pointed out or enforced.

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X. Before we paſs on to the conſideration of human laws, it may not be improper to ſtate and explane the difference between the law of nature, and the poſitive laws of God. [f] This difference will be beſt underſtood, if we conſider what it is, which makes any intelligible diſtinction between moral and poſitive duties. When the law of Moſes, for inſtance, forbids murder, and when it forbids the Iſraelites to eat the fleſh of ſuch animals, as it determines to be unclean; what is it, which makes one of theſe a moral and the other a poſitive precept? This point is not at all cleared up by ſaying, that one of theſe is a precept of the law of nature, and the other is not ſo: for this, inſtead of bringing us forward in removing the difficulty, only carries us back to the place, that we ſet out from. We cannot ſay, that moral and poſitive duties are diſtinguiſhed from each other, by the different authority, which eſtabliſhes them: becauſe the ſame God, who binds us to the obſervance of the law of nature, binds us likewiſe to the obſervance of his own poſitive laws. Neither can we ſay, that they are diſtinguiſhed from one another by the different ſanctions, upon which they are eſtabliſhed: becauſe happineſs to thoſe, who obey them, is the common ſanction of duties of both ſorts. This is planely the caſe both in the Goſpel and in the law of Moſes; where moral and poſitive duties are enjoyned under like penalties. We cannot therefore look for the difference of theſe two ſorts of duties here; unleſs we will maintain, that every moral duty becomes a poſitive one, whenever God is pleaſed to eſtabliſh ſuch moral duty by any expreſs promiſe of a reward to them, who perform it.

Difference between law of nature, and divine poſitive laws.

[f] Grot. *ibid.*

The principal mark of difference is to be found in the matter of the duties. The actions of men are, in their own nature, either good, or bad, or indifferent. Such actions as in themſelves, or of natural conſequence, tend to promote a common intereſt, or to prevent a common harm, are called morally good: they make a good part in the behaviour or morals of thoſe perſons, who do them; becauſe they are productive of good or happineſs to mankind. Such actions, as in themſelves, or of natural conſequence, tend to hinder a common good, or to produce a common harm, are morally bad: they make a bad part in the morals or behaviour of thoſe perſons who do them. Such actions are indifferent, as do not affect the general good or welfare of others, either one way or another; ſuch as in themſelves, or of natural conſequence, neither prevent harm nor do good, neither prevent good nor do harm. The law of nature, as has been ſhewn already, enjoyns all thoſe actions, which are morally good, and forbids all thoſe which are morally bad. By this means the former become duties, and the latter crimes. And if God, in any expreſs revelation of his will to mankind, has been pleaſed to recite any part of the law of nature, and to eſtabliſh it by any new ſanctions; ſtill the nature of the duties ſo recited and eſtabliſhed continues the ſame; and the actions thus enjoyned, being morally good, are called moral duties. But when any actions, which are indifferent in themſelves, are commanded or forbidden by any expreſs revelation of God's will; thoſe actions likewiſe, which God thus commands, become duties, and thoſe actions which he forbids, become crimes: however, as the actions in themſelves, or in their own nature, affect the the common good of mankind neither

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one way nor other, as they have nothing in them either morally good or morally bad; this ſort of duties are called poſitive duties. Thus in reſpect of God, fear, and love, and reverence are moral duties; becauſe they tend to promote a common good, ſince the obligations, that we are under to work for this end, depend upon our knowing it to be his will, that we ſhould ſo work; and unleſs we fear and love and reverence him, his will would not appear to be a law to us. But the particular forms or ceremonies, the particular times and places appointed for expreſſing theſe ſentiments, are of a poſitive nature. Temperance and charity, as they tend to promote a common good, or to prevent a common harm, are moral duties. But any extraordinary reſtraints upon our appetites, which have not ſuch a tendency, are duties of a poſitive ſort. In ſhort, ſince all ſuch actions as are good in themſelves, in the ſenſe already explaned, are called virtues; and all ſuch, as are bad in themſelves, are called vices; we may ſay in general, that all virtues are moral duties, and all vices are moral crimes; or that virtue and vice are the matter either of the law of nature, or of God's moral law, which enjoyns the former, and forbids the latter. But ſuch actions, as are indifferent in themſelves, ſuch as in their own nature are neither virtuous nor vicious, are the proper matter of God's poſitive law; they become duties, when he commands them, or crimes, when he forbids them.

I would not be underſtood to mean, that the obſervance of God's poſitive commands does not at all affect the general good of mankind, after he has been pleaſed to give them commands; or that the common intereſt is not concerned; whether they are obſerved or

neglected. There is certainly thus much of morality eve in all poſitive duties; that any habitual neglect of them is inconſiſtent with the fear, and love, and reverence which are due to God, and which are the ſureſt eſtabliſhment of the whole law of nature: ſo that they, wh pretend to deſpiſe all poſitive duties, as if they were o little or no importance, would do well to conſider, tha they may juſtly be looked upon as enemies to the gene ral good of mankind; in as much as they leſſen the au thority of God, and weaken the firmeſt ſupport of al moral virtue.

From the difference between the moral and the poſitive laws of God, in reſpect of the matter of thoſe laws, another mark of difference ariſes, in reſpect o the means by which we do or may arrive at the knowledge of them. The moral law of God commands all ſuch actions as in themſelves, or of natural conſequence, are productive of general good, and forbids all ſuch, as in themſelves, or of natural conſequence, are productive of general harm. Now the experience and the reaſon of mankind may diſcover this natural difference between virtue and vice, or between good and bad actions: and conſequently it is poſſible, in the nature of the thing itſelf, for mankind, by the uſe of their reaſon, to trace out the rules of moral duty. But then in reſpect of poſitive duties, which conſiſt of ſuch actions as are in their own nature indifferent, or of ſuch actions as do not appear to us to be productive of either good or harm to mankind, our reaſon can be no guide to us. For certainly reaſon can never diſtinguiſh the duties from the crimes, without ſome expreſs declaration of the will of the lawmaker, where nothing but his will makes any apparent difference between thoſe actions,

which

which are commanded, and thoſe which are forbidden.

Tho' I have here ſaid, that it is poſſible for mankind, by the uſe of their reaſon, to trace out the rules of moral duty; I would not be underſtood to intimate, that in reſpect of our moral duties all revelation is uſeleſs. In reſpect of theſe duties revelation may and does anſwer very uſeful and neceſſary purpoſes. In the nature of the thing itſelf, ſuch actions, as are moral duties, may be diſtinguiſhed from ſuch, as are criminal: becauſe there is a natural difference between them. But then as this difference conſiſts in the good or harm, which ariſes from our actions; long experience, cloſe attention, and accurate reaſonings are neceſſary to diſcover it. So that however poſſible it may be, in the nature of the thing itſelf, for mankind to trace out the rule of moral duty, without the aſſiſtance of revelation; it is in fact very unlikely, that they ſhould do it, without ſome ſuch aſſiſtance. The life of any one man is too ſhort, his obſervations too few, his attention too much taken up with other matters, to ſearch into the nature and conſequences of all human actions, and by general reaſonings to eſtabliſh a rule of duty. This would be the caſe, ſuppoſing we were all of us to employ ourſelves in this enquiry with as much diligence as the circumſtances of human life would admit of. Even upon this ſuppoſition we muſt have recourſe to the experience and reaſonings of thoſe, who have gone before us. But in general we have neither diligence, nor ſkill enough, to go thro' ſuch an enquiry: the bulk of mankind would never find out their duty, if they were not taught it; they would never give themſelves the trouble of looking for it, if it was not

laid planely before them. In this inſtance therefore revelation will be uſeful in reſpect of moral duties. It will help to teach the rule of duty, even to thoſe who are the moſt diligent enquirers; becauſe as the knowledge of God is infinitely ſuperior to our own, his declarations about the nature and conſequence of our actions will be a ſurer guide to us than our own experience and reaſonings can be. And wherever he has been pleaſed to point out our duty to us, neither want of leiſure nor want of ſkill can prevent us from ſeeing it. This then is the firſt uſe of expreſs revelation, in reſpect of moral duties. It aſſiſts the learned in their enquiries, and inſtructs the ignorant, who without ſuch inſtructions would have known little or nothing of it. But ſuch a revelation is of uſe not only in publiſhing the rule of duty, but more eſpecially in eſtabliſhing the obligations of mankind to obſerve this rule, by inſtructing them in the full knowledge of God and themſelves, by informing them what their true condition is at preſent, and by what means the wiſdom and goodneſs of God deſigns to lead them to happineſs hereafter. But I am entering too far into the province of theology; and muſt aſk the reader's pardon for this digreſſion.

Human voluntary laws of three ſorts. Civil laws what.

XI. [s]Human voluntary laws are of three ſorts; either the civil law, or a law of leſs extent which is not derived from the civil power, or a law of greater extent than the civil law. The civil law is a rule eſtabliſhed by the civil power, to which the ſubjects of any nation, who are under the authority of its civil power, are obliged to conform their behaviour. By the civil power we mean that power, which governs what is

[s] Grot. *ibid.* §. XIV.

Latin

tin is called *civitas*, in engliſh a ſtate, a nation or a vil community. And by a nation or civil communi- we mean a complete or perfect ſociety of men, who re in poſſeſſion of their perſonal liberties, and have nited themſelves into one body for the purpoſes of ſe- uring their rights, and of promoting a common in- ereſt. The name *civil law* is now almoſt appropriated o the civil law of the roman empire; as this has long een called ſo by way of eminence, whenever we ſpeak f the civil law, we are ſuppoſed to mean this. But whenever I have occaſion to ſpeak of this law, I ſhall all it the common law, and ſhall uſe the words *civil aw*, in the moſt extenſive ſenſe, for the law of the land n each particular nation or country, that is for the law, which the civil power in that nation or country has eſtabliſhed.

XII. [b] Human voluntary laws, which are of leſs extent than the civil law, and are different from it, as not being derived from the ſame power, are the rules, which any one, who has authority over others, different from civil authority, preſcribes to thoſe whom he has a right to command. Such are the rules, which the maſter of a family preſcribes to his children, or to his ſervants. The obligation of this ſort of laws does not extend ſo far as the obligation of civil laws; for the former extends only to the family, of which the father or the maſter is the head; the latter generally extends to all the members of the civil commuity. Or if in any inſtances the obligation of the civil law ſeems to be confined within narrower limits; yet even in theſe inſtances we may planely diſtinguiſh it from the law, that we are now ſpeaking of; if we only attend to the

Human law of leſs extent than the civil law.

[b] Grotius *ibid.*

authority from whence the law is derived. Thus military law, tho' it is confined to the army, is to be reckoned a part of the civil law, becauſe it is derived from the civil power. The particular laws of any body corporate, which is but a part of the civil community, differs from the civil law only as a part differs from the whole; becauſe the power, which ſuch a body corporate has to make laws for itſelf, is granted to it by the civil government.

Law of nations.

XIII. The law of nations is a law of greater extent than the civil law, and is not derived from the civil power. By the law of nations we mean ſuch rules, as nations or civil ſocieties are obliged to obſerve in their intercourſe with one another. There are ſeveral points relating both to civil laws and to the law of nations, which want to be explaned. But our buſineſs in this chapter was only to give the reader a general notion of laws, to ſhew him the ſeveral ſorts, into which laws may be divided; and to bring him acquainted with the general matter of the law of nature. Such points, as relate to civil laws or to the law of nations, ſhall be explaned in their proper place.

CHAP.

CHAP. II.

Of Rights and Obligation.

The word Right *ſometimes ſignifys a law.* II. *The ſame word ſometimes means a quality in actions.* III. *It commonly means a quality in perſons.* IV. *Rights perfect and imperfect.* V. *Obligation and right are correlatives.* VI. *Two maxims of natural law explaned.* VII. *What actions are void.* VIII. *Rights are natural or adventitious.* IX. *Rights are alienable or unalienable.* X. *Things are corporal or incorporal.*

THE word [i]*Right* is uſed in three different ſenſes. Sometimes it ſignifies a law. Indeed, in our own language, the word has very ſeldom this meaning; perhaps it is uſed in this ſenſe, when we ſay, that natural right requires us to keep our promiſe, or that it commands reſtitution, or that it forbids murder. But the latin word *jus*, which is ſuppoſed to anſwer to our engliſh word *right*, is very commonly made uſe of in that language in the ſame ſenſe as the word *lex*, to ſignify a law.

The word *Right* ſometimes ſignifys a *Law*.

II. [k] The word right ſometimes means that quality in our actions, by which they are denominated juſt or right ones. Tho' I think this quality is more uſually called the rectitude, than the right of our actions. The definition, which I have here been giving of right when it is uſed for the quality of an action, is the ſame that Grotius has given. And we may obſerve upon it, that our author, when he thus defines it, does not inform us what this quality is. But if we call it *rectitude* inſtead

The word *Right* ſometimes means a *quality* in actions.

[i] Grot. *ibid.* §. IX. [k] *ibid.* §. III.

of

of calling it *right*, we ſhall ſoon be able to inform ourſelves what it is, and wherein it conſiſts. The rectitude of an action can be nothing elſe but its conformity or conſiſtency with ſome rule: particularly, in morality, it is the conformity or conſiſtency of our actions with ſuch laws as we are bound to obſerve. It is from this conformity or conſiſtency of our actions with the law, that they are denominated lawful, or juſt, or right. In explaning what is meant by the right or rectitude of actions, I have made uſe of the two words *conformity* and *conſiſtency*; becauſe if I had uſed only the former word, the reader might have been led to imagine, that no actions are juſt or right ones, but ſuch only, as the law commands. Whereas in truth, not only ſuch actions, as are conformable to what the law commands, but ſuch likewiſe, as are conſiſtent with it, or are not forbidden by it, have all the rectitude, that is neceſſary to make them juſt, or right ones: for whatever actions are lawful, are juſt or right; and it is plane, that all actions are lawful, which the law does not forbid.

All our actions, in reference to the laws, are divided into ſuch as are duties, ſuch as are crimes, and ſuch as are indifferent: thoſe actions which the law forbids, are crimes; thoſe which it commands, are duties; and thoſe are indifferent, about which it is ſilent, ſo as neither to forbid nor command them. This latter ſort of actions the law allows of; and ſuch allowancc is ſufficient to make them lawful. And as every action is called lawful, if it is not unlawful; ſo every action is called juſt or right, if it is not unjuſt or wrong.

It is no unuſual miſtake to imagine, that ſuch actions only are to be eſteemed juſt as the law commands.

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nd if what has been ſaid already is not ſufficient to uard againſt this miſtake, and to ſhew the difference etween the notions of duty and rectitude, or between ch actions, as we are obliged to do, becauſe the law ommands them, and ſuch as are ſimply juſt, becauſe e law does not forbid them; we may obſerve fur-her, that the word *Juſtice* itſelf, tho' it ſeems to mean a oſitive quality in actions, frequently means a negative ne; or that actions are denominated juſt rather from hat is not in them, than from what is. Such actions are njuſt as have the quality of doing harm, or prevent-ng good: and ſuch actions are juſt as have not this uality. When therefore we ſay, that the law of na-ure commands us to be juſt; the meaning is, that it orbids us to do harm, or to prevent good. And con-equently our actions are as juſt, as this part of the law of nature requires, provided we are careful to avoid what the law forbids. So that in this view our actions are juſt, not only when they are ſuch as the law com-mands; but when they are ſuch, as the law is ſilent a-bout or does not forbid.

III. [1] By *Right* we commonly mean that quality in a perſon, which makes it juſt or right for him either to poſſeſs certain things, or to do certain actions. In this ſenſe we uſe it, when we ſay, that a man has a right to his eſtate, or a right to defend himſelf. By ſaying, that *he has a right*, it planely appears, that we conceive this right to be ſome quality, which belongs to him, or is inherent in his perſon. Now in this definition Grotius, inſtead of deſcribing the quality itſelf, has only deſcrib-ed the effect of it; inſtead of informing us what it

The word *Right* commonly means a quality in perſons.

[1] Grot. *ibid.* §. IV.

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is, and wherein it conſiſts: he only tells us what it does, that it makes a man's actions or his poſſeſſion juſt. However, we may eaſily diſcover what this quality is, if we will only aſk ourſelves, what it is, which makes our actions and our poſſeſſions juſt? The obvious anſwer to this queſtion is, that our actions or our poſſeſſions are juſt, where they are conſiſtent with law: and conſequently the right, which any perſon has to do an action, or to poſſeſs any thing, is nothing more than his power of doing this action, or poſſeſſing this thing conſiſtently with law.

Right and moral power are expreſſions of like import. A man's natural power extends to every thing, which his ſtrength enables him to perform, whether the law allows of it or not. But his moral power extends to ſuch things only, as his ſtrength enables him to perform conſiſtently with law. For in a moral ſenſe, or in reference to ſuch rules, as a man is ſtrictly obliged to obſerve in his behaviour, he is not ſuppoſed to have any more power than what the law allows him to exerciſe.

Rights perfect and imperfect.

IV. [m] Rights are divided into two ſorts, perfect and imperfect. He would be but an indifferent caſuiſt, who, in explaning the diſtinction between theſe two ſorts of rights, ſhould only tell us, that perfect rights are thoſe, which may be aſſerted with rigor, even by employing force to attain the execution, or to ſecure the exerciſe of them, in oppoſition to all ſuch as ſhould attempt to reſiſt or diſturb us: but, when reaſon does not allow us to uſe forcible methods, in order to ſecure the enjoyment of the rights, which ſhe grants us, then theſe rights are imperfect ones. If a man had any doubt

[m] Grotius, *ibid.*

concerning

oncerning ſome particular right, whether it was perect or imperfect; and was, upon making enquiry of his caſuiſt, to receive only this deſcription of the two ſorts of right; inſtead of being reſolved as to his preſent doubt, he would only be led to another; he would be ſure upon receiving this anſwer to doubt, whether the right was ſuch an one, as might be ſupported with rigor, and by the uſe of force, or not; and his caſuiſt would never be able to give him any reaſonable ſatisfaction in this point, till he has given a farther and clearer explanation of the diſtinction between the two ſorts of right, than this before us.

We may perhaps ſee the diſtinction between perfect and imperfect rights more clearly; if we obſerve, that, where the things, which we have a right to poſſeſs, or the actions which we have a right to do, are or may be fixed and determinate, the right is a perfect one: but where the things or the actions are vague and indeterminate, the right is an imperfect one. If a man demands his property, which is withheld from him, the right, that ſupports his demand, is a perfect one; becauſe the thing demanded is, or may be, fixed and determinate. But if a poor man aſks relief of thoſe, from whom he has reaſon to expect it; the right, which ſupports his petition, is an imperfect one; becauſe the relief, which he expects, is a vague and inderminate thing. As far as the bargain between a maſter and his ſervant has determined the ſervice, which the latter owes, and of courſe the command, which the former has a right to give, the maſter's right to command is a perfect one. But tho' a parent has a right to expect eſteem and reverence from a Son, that is of full age; yet as the meaſures of eſteem and reverence, which the ſon then

owes

owes to the parent, are not fixed and determinate; the right of the parent is, in this inſtance, an imperfect one.

If this account of the matter does not appear ſatisfactory, we may conſider it in another light. Where no law reſtrains a man from carrying his right into execution, the right is of the perfect ſort. But where the law does in any reſpect reſtrain him from carrying it into execution, it is of the imperfect ſort. Or, in other words, our right is a perfect one, where we can carry it into execution, without breaking in upon the right of other men; but it is an imperfect one, if the rights of other men ſtand in the way of it; ſo that we cannot carry it into execution without breaking in upon them. Thus I have a perfect right to defend my life againſt thoſe, who have no right to take it way. I have a perfect right to make uſe of ſuch means as are neceſſary for my defence; where the law does not preſcribe the means to be made uſe of. I have a perfect right to keep my property; ſince my poſſeſſion of what is my own does not violate the rights of any other man. When my property is witheld, my right to recover it is a perfect one; becauſe no law reſtrains me, or no perſon has any right to hinder me from recovering it. My poverty may give me a right to expect relief from them, that I have deſerved well of; but I cannot carry this right into execution without breaking in upon the right, which they have to their own property; the law therefore reſtrains me from carrying it into execution, and the right is an imperfect one. If I am well qualified for any office of truſt and profit in a civil ſociety, eſpecially if I am better qualifyed for ſuch office, than my competitors, I have a right to expect it: but this right is only an imperfect one;

one; becauſe the office being in the diſpoſal of the governors of the ſociety, I cannot carry my right into execution without breaking in upon their right to diſpoſe of it, as they pleaſe; and the ſame law, which gives them the diſpoſal of it, hinders me from carrying my right into execution.

Obligation and Right are correlatives.

V. Obligation and right are correlative terms: where any perſon has a right, ſome one or more perſons are under an obligation, which correſponds to that right: and on the contrary, where any perſon is under an obligation, ſome other perſon or perſons have a right, which correſponds to that obligation. If the right is a perfect one, ſo is the correſpondent obligation: if the right is an in imperfect one, the obligation is ſo too.

This might ſerve for the explaning the diſtinction of obligations into perfect and imperfect. As a man's right to his life is a perfect one; we may be ſure, if we know this, that the obligation not to take it from him is a perfect obligation. As the proprietor has a perfect right to demand his goods of us, when we happen to be in poſſeſſion of them, we are under a perfect obligation not to withold them. We are obliged to relieve the indigent; but our obligation is of the imperfect ſort, becauſe they have only an imperfect right to expect relief. When we have the diſpoſal of places of truſt or profit, we are obliged to give them to the moſt deſerving: but this obligation, in reſpect of thoſe, who are moſt deſerving, is an imperfect one; becauſe their right to the places, which they aſk for, is of the imperfect ſort.

But perhaps we may be able to diſtinguiſh between perfect and imperfect obligations, without attending immediately to the rights, which anſwer to them, by

by

by obſerving; that the obligations, which ariſe out of negative precepts of the law are perfect; and that thoſe which ariſe out of affirmative precepts, are imperfect. For ſince the matter of negative precepts is preciſe and determinate, ſuch precepts allow of no liberty at all; they take away the whole moral power of acting, and conſequently produce a perfect obligation. But the matter of affirmative precepts is not ſo preciſe and determinate; ſuch precepts are to be complyed with as we have proper opportunities; and our judgment is to direct us as to the opportunities: whilſt therefore they direct us how to behave, they allow ſome liberty of chuſing; and upon that account the obligation produced by them can only be imperfect. The law ſays—Thou ſhalt do *no* murder—The obligation here is of the perfect ſort; for the matter of the law is ſo preciſe and determinate, as to leave no moral power of acting. The laws ſays—Honour thy father and thy mother—The obligation here is imperfect; becauſe as the matter of the law is not preciſe and determinate, inſtead of leaving no power of acting, it ſuppoſes us to have ſuch a power, and directs us how to make uſe of it, as we have opportunity.

From what has been ſaid already concerning the nature of juſtice, that it conſiſts in doing *no* harm to others, it appears that the precepts of juſtice are all of them negative ones; and conſequently, that all of the obligations of juſtice are of the perfect ſort. But as kindneſs and favour conſiſt in doing good; the precepts of benevolence are affirmative, and upon that account the obligations to any of thoſe duties, by which any kindneſs or favour is done, are imperfect ones.

VI. There

VI. There are two maxims of natural law, which are often applied very injudiciouſly, and which want therefore to be explaned. One of theſe maxims is, — That no right can be founded on an injury. The other is, — That what could not be done lawfully, is valid, after it is done. To underſtand the meaning of theſe two general rules, and the proper application of them, it will be neceſſary to obſerve, that ſome actions, which are contrary to law, are not only wrong, but void; that is, the law conſiders them, as if they never had been done, as to any moral effect, that might have been produced by them: but ſome actions, which are contrary to law, are only ſimply wrong; they ought not to have been done; but after they are over, they produce the ſame moral effect, as if they had been right. Where the obligation of the law is perfect; ſuch acts, as are contrary to it, are void; or no moral effect is produced by them. The law ſays, — Thou ſhalt not ſteal. The obligation is of the perfect ſort; and upon that account the act of theft, as to any effect, which the poſſeſſion of goods might have produced, is void; the thief gains no property in the goods, which he has ſtolen. The reaſon of this is plane: in the uſe of our natural power we can break the law; but ſince the obligation, as it is a perfect one, has taken away the moral power of acting, the law does not ſuppoſe us to have any power left, and conſequently does not ſuppoſe any thing to have been done with any effect, where we have made uſe of ſuch natural power. Now an injury, properly ſo called, is a breach of juſtice, that is, it is a breach of a perfect obligation; and the production of a right is a moral effect. But ſince no breach of a perfect obligation can produce any

Two maxims of natural law explaned.

moral effect, it follows, that no right can be produced by an injury. Where the obligation of the law is imperfect, ſuch acts, as are done contrary to it, are ſimply wrong, and are commonly not void, but produce their proper effects, as if they had been right. The law ſays—Obey your parents. A ſon of full age contracts himſelf in marriage, contrary to the commands of his parents; ſuch a contract, though it is unlawful, is valid. The reaſon is, becauſe imperfect obligations do not take away a mans power of acting, but only direct him in the uſe of it. And when the law ſuppoſes a power of acting, it cannot ſuppoſe nothing to have been done, where ſuch power has been made uſe of. The act therefore is commonly not void, but will obtain its proper effect. Thus we ſee, that theſe two general rules, though at firſt ſight they may appear inconſiſtent with one another, are both of them true, when they are properly applied. The former rule, — That no right can be founded on an injury, — is to be applied to caſes of perfect obligation. The latter — That what was unlawful to be done, is valid, after it has been done — is applicable only to thoſe caſes where the obligation is imperfect.

What actions are void.

VII. [n] We have already ſeen, that ſuch actions as are contrary to any precepts of natural law, where the precept is of perfect obligation, are void; but that ſuch as are contrary to precepts of imperfect obligation, though they are wrong, are however commonly valid. I ſay, *commonly* valid, becauſe in ſome caſes, even ſuch actions as theſe are void. The way to know, whether actions, that are contrary to a law of imperfect obligation, are void or not, is to conſider the effect of them.

[n] Grotius Lib. II. Cap. V. §X.

If

If the effect is conſiſtent with the law, then the act is valid; becauſe as the obligation was imperfect, there was a moral power in the agent; the act therefore does not want a valid foundation: and becauſe the effect is conſiſtent with the law, by the ſuppoſition, the law will not hinder its effect. But if the effect is illegal, as well as the act, then notwithſtanding there ſeems to be no defect of moral power on the part of the agent, yet the act will be ſo far void as not to produce any effect: becauſe the effects cannot proceed or take place, where the law diſallows them. The law ſays — Honour thy father and thy mother. The obligation is imperfect. But yet, in virtue of this precept, the marriage of a ſon with his mother will be void; becauſe the effect of ſuch a contract is as inconſiſtent with the law as the act is. The ſuperiority, which ſuch a marriage would give to the ſon over his mother, is inconſiſtent with the honour, which the law requires him to pay to her. This may be expreſſed otherwiſe. What is done contrary to a precept of imperfect obligation will be void; if the validity of the act would diſcharge us from the obligation of ſuch precept for the future. Thus the law ſays, as above, — Honour thy father and thy mother. — A man vows, that whatever he gives to his father or his mother out of his ſubſtance, ſhall immediately be conſecrated to God, ſo as to make it unlawful for them to uſe it, or to receive benefit from it. Such a vow as this is a void one, notwithſtanding the precept, with which it is inconſiſtent, is only of imperfect obligation. The general reaſon is, becauſe the validity of it would make void a precept of the law of nature. And conſequently, as no man can have a moral power of releaſing himſelf from that law, no

man can have a moral power of doing any act, which will make that law void, or which, if it was to obtain its effect, would for the future releaſe him from the obligation of obſerving that law. So that in reality even in theſe inſtances, as in thoſe, where we tranſgreſs a precept of perfect obligation, the act is void from a defect of moral power in the agent.

Rights are natural or adventitious.

VIII. Another diviſion of our rights is into natural and adventitious. Thoſe are called natural rights which belong to a man by the gift of nature, thoſe which belong to him originally, without the intervention of any human act. Adventitious rights are ſuch as preſuppoſe ſome act of man, from which they ariſe, and upon which they originally depend. The rights which a man has to his life, to his liberty, to his health, to freedom from pain, to the integrity of his body, to his good name, &c. are natural ones. Property, or the right, which he has to his goods either moveable or immoveable, ſovereignty or the right which he has to command others of his own ſpecies, and many more of the like ſort, which ariſe from ſome previous bargain or contract, either expreſs or tacit, are adventitious ones. But though ſome of our rights are thus called adventitious, and are by this means diſtinguiſhed from natural rights; we muſt not imagine, that only the natural rights of mankind are under the protection of the law of nature; or that it is no offence againſt the law of nature to violate ſuch adventitious rights. This law equally forbids the violation of our rights of either ſort: ſuch things, as we acquire conſiſtently with the law of nature, are as much our own, as if nature had given us them originally: as much cauſeleſs harm, that is, as much injuſtice, is done

to

o a man, by cauſeleſsly taking from him what he has fairly acquired a right to, as by cauſeleſsly taking from him what he had a right to by nature. And ſince the law of nature equally forbids every inſtance of injuſtice, it forbids, not only the violation of mens natural rights, but of their adventitious ones too.

Rights are alienable or unalienable.

IX. Some of our rights are alienable, others are unalienable. Thoſe rights are alienable, which the law does not forbid us to part with. Thoſe only are unalienable, which we cannot part with conſiſtently with the law. There ſeems to be no other foundation for ſuch a diſtinction of our rights, but this. I know not how any one can ſhew, that any of our rights, either natural or adventitious, are unalienable, unleſs he can produce ſome law, which forbids our parting with ſuch right. Certainly where a mans right to poſſeſs a thing, or to do an action, is abſolute, or is not reſtrained or limited at all by the law; he may part with it, if he pleaſes, either by giving it up entirely, or by transferring it to ſome other perſon. An abſolute right is otherwiſe unintelligible: ſince the power of doing, as we pleaſe, makes up the whole notion of ſuch a right. This therefore may be laid down as a general and fixed rule, that none of our rights are unalienable, but ſuch as are in ſome reſpects reſtrained and limited by law.

Things are either corporeal or incorporeal.

X. Before we go on to conſider the ſeveral rights of mankind, and the manner of acquiring them; it may be of uſe to us to obſerve, that things, in the ſcience of natural law, are divided into corporeal and incorporeal. Our ſenſes will beſt inform us what things are corporeal; for ſuch things are called corporeal, as are the objects of our ſenſes. Of this ſort are a mans cattle,

his houſe, his furniture, his lands, his implements of huſbandry, his money, &c. Incorporeal things are ſuch, as cannot be ſeen or handled; they conſiſt of rights, and no real thing exiſts without us conformable to that idea of them, which is in the mind: only for better diſpatch, we frequently ſpeak of our rights, as if they were real things. Thus ſovereignty is ſpoken of, as if it was a real thing; though there is no corporeal exiſtence, which anſwers to our idea of it: it conſiſts wholly of a right to do certain actions, or to give and enforce certain commands. An advowſon, which is a right of preſentation or collation to a church, is an incorporeal thing. An eccleſiaſtical benefice is itſelf an incorporeal thing; there is no real thing exiſting, which anſwers to the whole notion of it; it conſiſts not only in a right to receive certain profits, but in a right likewiſe to do certain actions.

Our rights being divided, * as above, into rights to poſſeſs certain things, and rights to do certain actions, we will go on to conſider them under theſe two general heads.

* See § III.

CHAP.

CHAP. III.

Of Property.

I. *Property what.* II. *Things not appropriated originally.* III. *In the community of goods, a right to uſe ſupplies the place of property.* IV. *Inconveniences ariſing from a community of goods.* V. *Property remedies theſe inconveniences.* VI. *A conjecture about the firſt author of property.* VII. *Property aroſe from compact.* VIII. *This compact is either diviſion or occupancy.* IX. *Property now only to be acquired by occupancy.* X. *Mr.* Lock's *opinion examined.* XI. *Making a thing introduces no property but by occupancy.* XII. *Acquiſitions are either original or derivative.* XIII. *Property either general or particular.* XIV. *How far Property ceaſes by dereliction or extinction of the proprietors.*

I. OUR [p] right to things is either ſuch an one as is common to us with all mankind, or ſuch an one as is peculiar to ourſelves. Some things belong to us, becauſe they belong to the ſpecies in general, and to us among the reſt. Other things belong to us by ſuch a right, as excludes all the reſt of the ſpecies from having any thing at all to do with them. Such an excluſive right to things is called property. Where things are thus fully our own, or where all others are excluded from meddling with them, or from interfering in any manner about them; it is plane that no perſon, beſides the proprietor, who has this excluſive right, can have any claim either to uſe them, or to hinder him from diſpoſing of them, as he pleaſes. So Property what.

[p] Grotius Lib. II. Cap. II. § I.

that property, conſidered as an excluſive right to things, contains not only a right to uſe thoſe things, but a right to diſpoſe of them either by exchanging them for other things, or by giving them away to any other perſon, without any valuable conſideration in return, or even of throwing them away, which is uſually called relinquiſhing them.

Things not appropriated originally.

II. It does not appear, that the [q] Author of nature, when he provided for mankind ſuch things, as are neceſſary for the ſupport or comfort of life, appropriated particular things to particular perſons, or gave to any one a right to any part of this proviſion excluſive of the reſt of the ſpecies. The world, which we inhabit, the trees, herbs, and fruit, which the earth produces, the ſoil itſelf from whence they are produced, the inferiour animals, ſuch as birds, beaſts, and fiſhes, which ſupply us with food, or labour for us, or cloath us, or ſerve for our pleaſure, were given to all alike. As the Author and Giver of theſe things ſtands in the ſame relation to all mankind; his gifts, as far as reaſon can judge, muſt belong alike to all: nor can we conceive any of them to belong originally to any part of the ſpecies or to any individual excluſive of the reſt; unleſs we could find, that he had made ſome expreſs diviſion and aſſignment of them. Now as reaſon can never collect ſuch an expreſs or poſitive diviſion and aſſignment, ſo neither does revelation teach us that any ſuch was made, either from the beginning of the world, or in any ſubſequent period of it, by the Lord of all things. We therefore conclude, that all things belonged originally to all mankind in common, and that the excluſive right of property was introduced by ſome act of man.

[q] Grot. *ibid.* § II.

III. If

III. If things had continued in this ſtate of community, they would have been uſed and enjoyed by us, only as we had occaſion for them: each perſon might have taken out of the joint ſtock as much as he wanted, and no more, and might have applied to his own purpoſes what he had ſo taken, as long as he wanted it, and no longer. For theſe common goods are his in no other reſpect, and for no other purpoſes, but to ſupply his wants; and they belong to the reſt of mankind in the ſame reſpect, and for the ſame purpoſes, as much as they belong to him. Theſe purpoſes therefore limit his claim to them; ſince all his claim is only to uſe what he has occaſion for. And conſequently he can have no right to take more than is neceſſary, or to keep what he has ſo taken longer than is neceſſary. Whilſt things continued in this ſtate of community, the general claim of all mankind to uſe what they wanted ſo far ſupplied the place of property, that each individual, though he could not accumulate poſſeſſions, had an opportunity of furniſhing himſelf with the neceſſaries of life, and even with the conveniences of it too; provided no perſon had any occaſion for what he had taken beyond what was barely neceſſary.

In a community of goods, a right to uſe ſupplies the place of property.

From hence we may underſtand, that a man might poſſibly be injured in reſpect of theſe common goods, even though, by the ſuppoſition of their being common, he had no excluſive right of property in any of them, but only a claim in common with the reſt of mankind to uſe what he wanted. If they belong to him, as they belong to the reſt of mankind; they, who hinder him from uſing what he wants, when they do not want it themſelves, do him a cauſeleſs harm; he has a right in common with them to uſe what he wants, and they take his right from him.

IV. Such

Inconveniences arising from a community of goods.

IV. Such a community of goods as we have be ſpeaking of, would neceſſarily become inconvenient, the wants of mankind encreaſed, and as the love of j ſtice and equity decayed amongſt them. The wants mankind were encreaſed by poliſhing their manner and by introducing amongſt them a civilized and el gant way of living. Savages, who could be content to live in caves, to cloath themſelves with bark or ſkin and to feed upon nuts or acorns, or ſuch other fruits the earth produces without much culture, would hav but few wants, and theſe wants would be eaſily ſup plied. But when men are civilized, and improved their way of living; they muſt have convenient houſe uſeful furniture, warm and clean cloathing; and the food muſt be prepared and dreſſed for them, befo they can eat it. This encreaſe of wants ariſing from civilized and improved way of living would not be per ceived; if nature furniſhed us with as plentiful a ſup ply for theſe wants, as for the ordinary wants of a ſa vage. But materials to ſupply ſuch wants, as theſe, ar not to be met with every where: nature has given u ſome of them ſo ſparingly, that it requires much in duſtry to collect them: and even thoſe, which are col lected moſt readily, are not fit for uſe, till they are im proved and manufactured with much art and labour So that even in theſe inſtances, where materials are plen tiful, proviſions would be ſcarce; if there were not able heads to contrive, and a number of hands to work.

But the encreaſe of numbers will be an additional en creaſe of the wants of mankind. Whatever way o life they may be in, the greater their numbers are the greater plenty of proviſions they will have occa ſion for. The ſame quantity of materials, or the ſame improve-

improvements, which would produce plenty, if there were but few men to conſume what is provided, would be too ſcanty to ſupply the demands of a multitude. When the wants of mankind, compared with the proviſions for ſupplying them, were thus encreaſed; it would become not only inconvenient, but inconſiſtent too with their peace and quiet, to continue joint partners of all things, as of a common ſtock belonging equally to all. For when the wants of them all, in ſuch a ſcarcity of proviſions, could not be ſupplied at once; when more men came at the ſame time to have occaſion for the ſame thing, which could not however anſwer the purpoſes of more than one of them; in ſuch a ſtate of community, where each has the ſame claim to what all of them want, and but one of them can enjoy, diſputes and quarrels would be endleſs.

This inconvenience would become more preſſing, if mankind failed in the practice of equity and benevolence towards one another. Few would be willing to labour for the improvement of a common ſtock, where others are to enjoy in common with themſelves the produce of their contrivance and induſtry; and few, even of them, who were leaſt able or leaſt inclined to work, would be willing to take up with the rude and uncultivated ſupplies of nature, or be contented to uſe and enjoy nothing, but what they had cultivated and improved themſelves. Thus on the one hand the want of ſuch benevolence, as might incline us to labour for the good of the ſpecies, and on the other hand the want of ſuch equity, as might diſpoſe us to be ſatisfied with the fruits of our own induſtry, would encreaſe thoſe diſputes and quarrels, which a ſcarcity of proviſions had begun.

V. The

Property remedies thoſe inconveniences.

V. The moſt effectual way of ſecuring the peace of mankind, in theſe circumſtances, is by introducing an excluſive property. As by this means the extent of each perſons claim is aſcertained, and the particular ſhare out of the general ſtock which belongs to him is ſettled; he can have no juſt grounds of quarrelling with others, for taking more than they ought to have, whilſt they let his property alone: and they on the other hand can have no pretence to hinder him from uſing and enjoying what he has a right to uſe and enjoy excluſive of them. If his ſhare is large enough to ſupply him with the conveniences and elegances of life; thoſe, who are more ſcantily ſupplied, have no juſt reaſon to complane, that they are injured: and if the ſhare, which is allotted to him out of the general ſtock, will afford him no more than the neceſſaries of life, he muſt content himſelf, as well as he can, with this ſmall proviſion; becauſe he knows, that he can claim no more. This then is one advantage of an excluſive right above a community of goods; that, though it may ſometimes be a queſtion, amongſt ſeveral claimants, which of them has the right; yet theſe queſtions will ſeldom ariſe: and even when they do ariſe, they will admit of a deciſion: no two perſons can have full property in the ſame thing; becauſe the property of one effectually excludes the claim of the other. Whereas in a ſtate of community, where all have an equal right to the ſame thing, it would be a continual queſtion, which claimant ſhould uſe or enjoy the matter in diſpute: nor could ſuch a queſtion be eaſily decided; becauſe neither of the claimants could ſet forth ſuch a right, as would effectually over-rule the pretenſions of his competitor. But there is, beſides this, another conſiderable

advantage

dvantage ariſing from the introduction of property. ſuch an excluſive right aſſigns to each perſon the part, r materials, in which he is to labour, and makes the im- rovements produced by his art and induſtry, entirely his wn. Men will be more ready to make improvements, when they are morally ſure of enjoying them; than hey would be, if others, who are unwilling to work, had any claim upon the fruits of their labour. Theſe ſeem to be the reaſons, which determined mankind to change their right to things from a common claim, which belonged to all alike, into an excluſive claim of particular property.

A conjecture about the firſt author of property.

VI. If we look into the hiſtory of the firſt ages of the world, as it is recorded by Moſes, in the book of Geneſis, we may there perhaps meet with ſome account of the firſt inventor of property. Suppoſing the reaſons for introducing this change to have been rightly aſſigned, we ſhould look for the origin of property amongſt them, whoſe wants were the greateſt, who were moſt ſcantily provided for, and who were leaſt likely to practiſe the duties of benevolence and equity towards one another. All theſe circumſtances concur in the poſterity of Cain. Their [r] anceſtor had killed his brother; and his fears, leaſt the reſt of mankind ſhould puniſh this crime upon him and his poſterity, induced him and his family to unite themſelves together, and to build a city for their defence. By living in ſociety, their manners were poliſhed; and a refined way of living was introduced amongſt them. This ſeems to be evident; becauſe we find, that they were the inventors of arts and ſciences, both of ſuch as are uſeful, and of ſuch as adminiſter to pleaſure. Tubal-cain was the

[r] Geneſ. IV. 8, 17, 21, 22.

inſtructor

inſtructor of every artificer in braſs and iron; and Jubal was the father of all ſuch as handle the harp and organ. This family had ſeparated themſelves from the reſt of mankind, and were ſhut up together within a narrow diſtrict: where, if there had been but a few of them, and they had been contented with coarſe fare and ordinary cloathing, they would have found it difficult enough to ſupply themſelves. But the difficulty was rendered greater not only by their elegance and luxury, but by the conſtant encreaſe of their numbers. We have no reaſon to imagine, that this family had any great ſenſe of duty: it is much more likely, that, as they lived with a bad parent, the influence of his example had indiſpoſed them to obſerve the rules of equity and benevolence in their behaviour towards one another. Here therefore we are to look for the beginning of property, or of an excluſive right to things. And the ſacred hiſtorian informs us accordingly, that [s]Jubal was the father or inventor of poſſeſſion. Our tranſlators render it, *of ſuch as have cattle*. But Jubal could not be the firſt, who taught how to bring up, and take care of cattle: becauſe we read that Abel had before this time been engaged in this employment. The original word ſignifies *poſſeſſions* of any ſort, acquired in any manner, and is not neceſſarily confined, as our tranſlators confine it here, to poſſeſſions of cattle. If therefore we render this paſſage, as it ought to be rendered, that Jubal was the inventor of poſſeſſions; there will be ſome appearance of reaſon for concluding, that he was the firſt projector of particular property. [t]Abel is indeed ſaid to be a keeper of ſheep, and Cain to be a tiller of the ground: but it is not neceſſary,

[s]Gen. IV. 20. [t]Gen. IV. 2.

that

hat each of theſe ſhould have had property in his re-
pective department; ſince they might, either by their
wn choice, or by their fathers appointment, under-
ake to cultivate theſe two different parts of the com-
non ſtock.

VII. But let us return from this digreſſion. [u] We have ſeen by what reaſons mankind were led to introduce ſuch an excluſive right as we call property, and are to enquire, in the next place, in what manner it could be introduced conſiſtently with juſtice. The common claim, which all men originally had to all things, is taken away by the introduction of property, as far as this excluſive right extends. Where one man has a right to exclude all others from the uſe or enjoyment of a thing; they cannot poſſibly have any claim of common right to uſe and enjoy it. Now it would be inconſiſtent with juſtice to deprive them of their common right without their conſent. Property therefore could not be introduced, conſiſtently with juſtice, unleſs mankind conſented to it either expreſsly, or tacitly. But if they lawfully might, and actually did, give ſuch conſent; that is, if their common right was alienable, and they agreed to alienate it; no injury was done to them by the introduction of property. There is no reaſon to ſay, that this common right is unalienable: there is indeed no law of nature, which commands the introduction of property; but neither is there any, that reſtrains men from giving up their common claim for the benefit of any one, who has a mind to appropriate to himſelf what would belong to all in common, unleſs they had parted with their claim.

Property aroſe from compact.

[u] Grot. Lib. II. Cap. II. § II.

VIII. When

This compact is either division or occupancy.

VIII. When mankind were few in number, and lived together in the ſame place, they could eaſily meet in order to divide their common ſtock, and to aſſign to each other his proper ſhare by expreſs conſent, agreement, or compact. But after their numbers were encreaſed, and they were ſettled in different parts of the world very diſtant from one another, it became impoſſible for all of them to meet together. This method therefore of introducing property by expreſs conſent was rendered impracticable. Some conſent however has been ſhewn to be neceſſary, to make the introduction of property conſiſtent with juſtice: and a tacit one would be ſufficient for that purpoſe. Such a tacit conſent is called occupancy. Indeed occupancy is but one part of the act, which is called by this name; but as it is the leading part, it has given its name to the whole act. What a man ſeizes upon, with a deſign to make it his own, or to appropriate it to himſelf, will become fairly his own, or will be made his property; when the reſt of mankind, as far as they have an opportunity of obſerving him, underſtand what his deſign is, and ſhew by their behaviour, in not moleſting him, that they agree to let his deſign take effect. If they know his intention, and do not interrupt or contradict it, when they have it in their power, they tacitly conſent to it.

A mans bare intention, of acquiring property in a thing, is not enough to make it his own; till that intention is known: for without the conſent of mankind no property can be gained juſtly; and there can be no ground for preſuming, that they conſent to what they know nothing of. Now the act of occupancy is the outward mark, by which his intention is made public.

And

And this act is therefore understood to give him property; because if the rest of mankind, that is, if the joynt partners, who had before a right in common with him to the thing, which he has seized, do not upon this notice of his intention assert that common right, they are presumed to part with it. However, before a right of property can proceed upon the act of occupancy, one circumstance is necessary, which is, that the thing seized upon should be certain and determinate. No consent of mankind can be presumed to be given to what the occupant designs, any farther than that intention is or may be known to them. And if the thing seized upon is uncertain and indefinite, the act of occupancy leaves his intention doubtful and obscure; the rest of mankind do not understand what it is: and their consent cannot be supposed to reach any farther than their knowledge.

Upon the whole then; property, as we have seen already, cannot be introduced consistently with justice, unless by the common consent of mankind. The consent, which is necessary for this purpose, might either be given expressly, when all mankind could meet together; and such an agreement is called division: or else it may be presumed, in consequence of the future proprietors having without molestation taken and kept possession of the thing, which he intends to make his own; and such a tacit agreement is called occupancy.

IX. But though either division or occupancy might give property in the first ages of the world; when all the joynt commoners could meet together; the way of introducing property by division is now at an end. The great numbers of mankind, and their remoteness from

Property can now only be acquired by occupancy.

one another, have rendered it impoſſible for them all to meet, and to divide the common ſtock of goods, or ſuch parts of the common ſtock, as have not yet been appropriated. There is therefore at preſent no other method left for beginning property but occupancy only; all things which were not appropriated formerly, muſt now be appropriated by occupancy, or not at all.

Mr. Lock's opinion examined.

X. Mr. Lock agrees with Grotius, that occupancy is the foundation of private property. But then he does not conſider occupancy in the ſame light, that Grotius conſiders it, as a tacit agreement between the joynt owners of the common ſtock and the future proprietor. In his opinion things, which originally belonged to all mankind in common, became the property of the firſt occupant; becauſe, as he has a property in his own perſon, and conſequently in the labour of his body, or in the work of his hands, by removing any thing out of the ſtate, in which nature placed it, he has mixed his own labour or a perſonal act of his own with it; and by thus joyning to it ſomething, which is his own, he makes it his property. For this labour being the unqueſtionable property of the labourer; no man, but he, can have a right to what that is once joyned to; at leaſt where there is enough, and as good left in common for others. Thus, whilſt he agrees with Grotius in words, they differ widely from one another, when the ſenſe of their words is explaned.

I deſign to examine at large his application of what is here advanced. But before we do that, let us ſtop a while, and enquire, whether his firſt principles are true. — As every man has a property in his own perſon; the labour of his body and the work of his hands

re properly his. — Now the labour of a mans body, or the work of his hands, may mean either the perſonal act of working, or the effect which is produced by that act. In the firſt ſenſe it muſt be allowed, that a mans labour is properly his own; he has a right to exert his ſtrength in what manner he pleaſes, where he is under no reſtraint of law. But it does not follow from hence, that the effect of his labouring, or that the work of his hands, in the other ſenſe of theſe words, muſt likewiſe be properly his own. He has, you may ſay, mixed his own labour with what he removes out of that ſtate, in which nature had left it: but will you conclude, that by thus joyning to it his act of working, he has made it his own? In order to ſtrengthen ſuch a concluſion it would be neceſſary to ſhew, that the labour of one man can overrule or ſet aſide the right of others. If I knowingly employ myſelf, in working upon the materials of my neighbour; however I may have mixed a perſonal act, which is my own, with his property; this will never give me a reaſonable claim to his materials. You may urge, that the caſes are not parallel; becauſe the materials, now in queſtion, are not the property of any one; and conſequently, that, by working in ſuch materials, we may gain property in them; though we could not gain it, by the like act, where the materials were appropriated before. But the caſes are parallel, as far as the point before us requires. It is allowed, that the materials do not belong to any perſon by an exclusive right of property; but then they belong to all mankind of common right. And if mixing my labour with the materials of an individual will not make theſe materials mine, in oppoſition to his excluſive right, I know not

how any act of the ſame kind, or the mixing my labou with materials, which belong to all mankind, ſhoul make them mine, in oppoſition to their common right As ſetting aſide the right of an individual, without hi conſent, is an injury to him; ſo ſetting aſide the com mon claim of mankind, without their conſent, is an in jury to them: and if an injury cannot be the founda tion of a right in one caſe; it will not be very eaſy t prove, that a like injury may be the foundation of right in the other caſe.

Mr. Lock has applied theſe principles to explane th introduction of property both in moveable and immo veable goods. And if we go on to examine what h ſays upon the ſubject, we ſhall find, that he has mi taken the exerciſe of a common right for the excluſiv right of property. "[w] He that is nouriſhed, ſays thi writer, by the acorns he picked up under an oak, o the apples he gathered from the trees in the wood has certainly appropriated them to himſelf, no bod can deny but the nouriſhment is his. I aſk then When did they begin to be his? when he digeſted? or when he eat? or when he boiled? or when h brought them home? or when he picked them up? And 'tis plain, if the firſt gathering made them no his, nothing elſe could. That labour put a diſtin ction between them and common: that added ſome thing to them, more than nature, the common mo ther of all, had done; and ſo they became his pri vate right. And will any one ſay, he had no right to thoſe acorns or apples, he thus appropriated, be cauſe he had not the conſent of all mankind to make them his? Was it robbery, thus to aſſume to him-

[w] Locks works, Vol. II, pag. 181.

elf what belonged to all in common?" The anſwer ere is obvious. When thoſe acorns or apples are be-ome a part of his body, we may, if we pleaſe, ſay, that ney are his: but the right, which he then has in them, s the ſame, which he has in his whole perſon; and is o more to be called a right of property, in the ſenſe hat we uſe this word, when we apply it either to noveable or immoveable goods, than the right, which man has in his leg or his arm, can be called by this ame. When he gathered them, or when he boyled hem, he had likewiſe a right in them; but it was juſt uch a right as any one elſe might have had: a right, s one of the joint commoners, to uſe as much out of he general ſtock, as he had occaſion for. It is by no neans neceſſary either to allow on the one hand, that e had an excluſive right of property in them, or on he other hand to contend, that it was robbery, thus o aſſume to himſelf what belonged to all in common. There is a middle opinion between theſe two, which is he opinion already mentioned; that when he gathered hem, and was eating them, he exerciſed his common ight of uſing and enjoying, out of the joynt ſtock, what his occaſions called for. Though therefore we con-end, that he could not acquire an excluſive right of roperty in them, or in any thing elſe, without the conſent of mankind, either expreſs or tacit; yet there s no fear of his being ſtarved, whilſt he is waiting or this conſent; becauſe in the mean time the exerciſe f his common right will ſufficiently provide for his ubſiſtence.

That it is this common right which a man exerciſes, when he ſeparates a thing for his own uſe, and claims o uſe it, becauſe he has ſo ſeparated it, will appear

from the limitation, which Mr. Lock himſelf puts upo what he calls property, when it is thus acquired. " [x] God has given us all things richly, is the voice o reaſon, confirmed by inſpiration. But how far ha he given it us? To enjoy. As much as any on can make uſe of, to any advantage of life, before i ſpoils, ſo much he may, by his labour, fix a proper ty in: whatever is beyond this, is more than hi ſhare, and belongs to others. Nothing was made b God for man to ſpoil or deſtroy." But certainly to take no more than we want, or no more than w can make uſe of, before it will be ſpoiled, is a limi tation unknown to property: it belongs only t the exerciſe of a common right in a joynt ſtock; where no one of the commoners has an excluſive right to keep, but all and each of them have a joint right to uſe.

But Mr. Lock endeavours to take off this limitation, and to ſhew us by what means, upon the ſame principles, property might be accumulated. " [y] The greateſt part of things really uſeful to the life of man, and ſuch as the neceſſity of ſubſiſting made the firſt commoners of the world look after, as it doth the Americans now, are generally things of ſhort duration; ſuch, as if they are not conſumed by uſe, will decay and periſh of themſelves: gold, ſilver, and diamonds, are things, that fancy or agreement hath put the value on, more than real uſe, and the neceſſary ſupport of life. Now of thoſe good things, which nature hath provided in common, every one had a right to as much as he could uſe, and property in all he could effect with his labour; all, that his

[x] Lock ut ſup. [y] Lock ut ſup. pag. 186.

induſtry

induſtry could extend to, to alter from the ſtate nature had put it in, was his. He that gathered a hundred buſhels of acorns, or apples, had thereby a property in them, they were his goods, as ſoon as gathered. He was only to look, that he uſed them before they ſpoiled, elſe he took more than his ſhare, and robbed others. And indeed it was a fooliſh thing, as well as diſhoneſt, to hoard up more than he could make uſe of. If he gave away a part to any body elſe, ſo that it periſhed not uſeleſsly in his poſſeſſion, then he made uſe of it. And if he alſo bartered away plums, that would have rotted in a week, for nuts, that would laſt good for his eating a whole year, he did no injury; he waſted not the common ſtock; he deſtroyed no part of the portion of goods, that belonged to others, ſo long as nothing periſhed uſeleſsly in his hands. Again, if he would give his nuts for a piece of metal, pleaſed with its colour, or exchange his ſheep for ſhells or wool, for a ſparkling pebble or a diamond, and keep them by him all his life, he invaded not the rights of others; he might heap up as much of theſe durable things, as he pleaſed; the exceeding the bounds of his juſt property not lying in the largeneſs of his poſſeſſions, but the periſhing of any thing uſeleſsly in it." But this writer ſeems here to take for granted the point in queſtion. We contend, and he allows, that the right of him, who gathered acorns or plums, extends no farther than to ſuch a quantity of them, as he can uſe before they are ſpoiled: and in ſhewing how this limitation may be removed, he reaſons as if there was no ſuch limitation. How elſe ſhould he, who had collected more plums, than he could uſe before they were

ſpoiled, or more ſheep than he wanted to cloath or to feed himſelf, barter away the plums for nuts, which would keep the year round, or for metal, that would keep as long as he lived? The very notion of bartering implys property. Our author therefore muſt ſuppoſe the man to have property in what would ſpoil before he can uſe it; or elſe he could not ſuppoſe him to barter it away: that is, ſince this contrivance of bartering was introduced, to ſhew how property might be accumulated, or to take off the limitation of appropriating no more than can be uſed, whilſt it is good; in order to apply this contrivance, he muſt ſuppoſe the limitation to be taken off already, and the man to have property in plums, or ſheep, which he does not want, and which he could not uſe, before they would periſh in his hands. Indeed if mankind would conſent and ſubmit thus to barter one with another; this conſent would be ſufficient to take off the limitation, and to introduce a true right of property. For if I knowingly and willingly bargain with another about my own goods, which are in his poſſeſſion, as if they were his; this act of mine may well be conſtrued as a tacit conſent to make them his. And if in like manner mankind would bargain with one another about goods, which belonged to all in common, as if they were the property of the poſſeſſor, they tacitly give up their claim to thoſe goods, and ſo they become his property. But property, when introduced after this manner, is introduced by conſent of parties, and not by the labour, which the poſſeſſor, or occupant, has employed in ſeparating the things, which he poſſeſſes, from the common ſtock.

In

In Mr. Locks opinion, property in immoveable goods, ſuch as the earth or ſoil, is acquired in the ſame manner and is governed by the ſame meaſure, as property in moveable goods. "[z] As much land as a man tills, plants, improves, cultivates, and can uſe the product of, ſo much is his property. He by his labour does, as it were, encloſe it from the common." But what is this again, but the exerciſe of a common right, inſtead of ſuch an excluſive right as property is. For not to inſiſt here upon the limitation of having property only in ſo much land, as we can uſe; let us try the effects of this right, and ſee whether they are the ſame with the effects of property. Suppoſe then, that the man, after he has for ſome time tilled the land, and cultivated it, was either by age or ſickneſs to become incapable of tilling and cultivating it any longer: if the mixing his labour with it was his whole title to it; when his labour ceaſes, his title to the land muſt ceaſe with it; the land can be his no longer, than he can cultivate it; and when he is diſabled for labouring, he cannot ſell or let it to any other perſon: that is, it was his to labour in, but not his to diſpoſe of as he pleaſes: and conſequently his right could only be a right to uſe, and not an excluſive right of property. This Mr. Lock might have been ſenſible of, if he had attended his own reaſoning. "[a] He, ſays this author, that in obedience to the command of God, to improve the earth to the benefit of life, tilled and ſowed any part of it, thereby annexed to it ſomething, that was his property, which another had no title to, nor could, without injury, take from him. Nor was this appropriation of any parcel of

[z] Lock ut ſup. pag. 182. [a] Lock ut ſup. pag. 182.

land,

land, by improving it, any prejudice to any oth man, ſince there was ſtill enough, and as good le and more than the yet unprovided for could uſe If then his title to the land, which he occupies, re upon this principle, that there was enough for other beſides what he had taken for his own uſe; it is pla that, unleſs there had been enough for others, his ti would not have been a good one: and from hence follows, that all his title is no more than a comm right to uſe what he wants, and not an excluſive rig of property: becauſe the right of property does not all depend upon the convenience of others.

To ſtrengthen this opinion concerning the introduction of property, and to anſwer an objection, whic has been hinted at already, Mr. Lock compares th value of labour with the value of land, in order to ſhew that the property, which a man has in his labour, when he has mixed that labour with the land, overbalances the value of the land, with which it is ſo mixed. "[b] Nor is it, ſays he, ſo ſtrange, as perhaps before conſideration it may appear, that the property of labour ſhould be able to balance the community of land. For it is labour indeed, that puts the difference of value on every thing; and let any one conſider what the difference is between an acre of land planted with tobacco, or ſugar, ſown with wheat or barley; and an acre of the ſame land lying in common, without any huſbandry upon it, and he will find, that the improvement of labour makes the far greater part of the value. I think, as he goes on, it will be but a very modeſt computation to ſay, that of the products of the earth, uſeful to the life of man, nine

[b] Lock ut ſup. pag. 184.

tenths

nths are the effects of labour: nay if we will right-
eſtimate things, as they come to our uſe, and caſt
o the ſeveral expences about them, what in them is
urely owing to nature and what to labour, we ſhall
nd, that in moſt of them ninety nine parts in a
undred are wholly to be put on the account of la-
our." But we may aſk in return, what the value of
ure labour is, when conſidered merely as the perſonal
ct of the labourer? If neither the timber of his plough,
or the horſes, that draw it, nor the meat, which they
at, nor the manure, which he lays upon his land, nor
he grain, with which he ſows it, are his own, what will
ou rate his labour at? Certainly you rate it much too
igh, if upon comparing it with the value of the land,
ou ſet it at ninety nine parts in a hundred, or even at
ine parts in ten. But you will ſuppoſe all theſe mate-
ials to be his own. I aſk therefore how he gained
property in them? You anſwer, by his labour, and ex-
plane this labour to be only the act of taking them or
ſeparating them from the common ſtock. Now this
labour is of little or no value at all; and conſequently
you cannot ſay, in this inſtance, that the common right
of mankind is overbalanced by the labour of the occu-
pant. And if, in one inſtance, a labour, which is worth
nothing, when compared with the thing acquired, will
give the occupant property; then we can have no rea-
ſon to imagine, that it is the high rate of labour, when
compared with the value of land, which ſo overbalances
the common right of mankind to the land, as to give
the labourer an excluſive right to it. You have only
dazzled our eyes with this high account of the value of
labour; ſince you muſt, in order to give it ſo high a
value, ſuppoſe property to have been introduced before-
hand

hand by a labour, which is of little or no value at a
We may go one ſtep farther. The property of labour, yo
ſay, overbalances the community of land: becauſe th
value of it, when compared with the value of land,
worth ninety nine parts in a hundred. Now if, by ſay
ing, that the property of labour overbalances the com
munity of land, you only mean, that labour is worth
much more than uncultivated land, we might allow it
But if you mean, that, becauſe the value of labour i
ſo much greater than the value of land, the labour o
one man will overrule or ſet aſide the common claim o
all mankind, we muſt deny it. For ſuppoſe the labou
of him, who cultivates the land, to be worth ninety
nine parts in a hundred of the whole value of the land,
after it is cultivated; all that could be due to the la-
bourer, upon this ſuppoſition, would be no more than
the produce of his own labour: the ninety nine parts,
which belong to him, would not ſwallow up the hun-
dreth part, which he had originally no excluſive right
to. This hundreth part, that is, the land itſelf, muſt
therefore ſtill remain in common, as it was before; he
might labour in it again, if he pleaſed, as one of
the joynt commoners; but he would have no property
in it. Let us try this reaſoning in another inſtance.
The landlord, as we call him, or the owner of the ſoil,
after property has been introduced, has an excluſive
right to ſome certain quantity of land, ſuppoſe for in-
ſtance, to an acre which bears twenty buſhels of wheat:
the tenant ploughs and ſows this land; and beſides
the mere perſonal act of labour, he uſes his own ma-
terials in cultivating the land. Now the labour of the
occupyer puts the chief value upon the land, and with-
out this labour it would be worth little; for it is to

this

is, that we owe all its uſeful production. For whatever the ſtraw, bran, bread, &c. of that acre of wheat is worth more than the product of an acre of as good land, which lies waſte, is all the effects of labour. You ſee then how much the property of labour overbalances the property of land. But no one will be led to conclude from hence, that, becauſe, according to this reckoning, in the value of an acre of land ninety nine parts in a hundred are owing to the labour of the occupyer, the property, which he has in his own labour, will ſwallow up the property which the landlord has in the ſoil; and that the land, becauſe he has cultivated it, will for the future become his own. But if the right of property in the ſoil, which in eſtimating the value of land, is but one part in a hundred, is not overruled or ſet aſide by the overbalance in the value of labour; I can ſee no reaſon why the ſame overbalance ſhould be ſuppoſed to ſet aſide the common claims of mankind to land, which was never appropriated. Let the right be what it will, whether it is a right of property, or of common claim, if an overbalance in the value of the labour, which is joyned to it, will not ſwallow up one of them, no good reaſon can be given, why it ſhould ſwallow up the other.

XI. The moſt natural claim to a thing ſeems to ariſe from our having made it: for no one appears to have ſo peculiar a right in it, as he, who has been the immediate cauſe of its exiſtence. This opinion, if it was true in the full extent of it, would overturn our general poſition that diviſion and occupancy are the only ways of introducing property. But [c] it is to be obſerved, that when we make a thing, we do not pro-

Making a thing produces no property but by occupancy.

[c] Grot. Lib. II. Cap III. §. III.

duce

duce the materials: theſe exiſted before, and all, th we do, is to give a new ſhape or form to them. No the materials, out of which a thing is made, are eith our own property; or they are the property of ſom other perſon; or they are the property of no one, b are in common to all. If, before we made the thing the materials were our own; it is plane, that by makin the thing we do not introduce any new or origin claim, but only continue our former claim. The ma terials were our own, before the thing was made; an nothing elſe is our own afterwards: they are ſtill th ſame materials, but only in a different ſhape. If th materials were the property of ſome other perſon; th maker of the thing has naturally no claim to them; unleſs he makes amends to the owner of them, o unleſs the owner voluntarily gives them up. For it would be an injury to the owner of ſuch materials to take away his property, without his conſent. But if the materials were in common, before the thing was made; that is, if they were not the property of any one; then by making a thing out of them property is introduced: becauſe, in this caſe, the maker is the firſt occupant. As far therefore as ſpecification, or the making a thing, differs from occupancy, it does not produce property: and whenever it does produce property, it obtains this effect only becauſe it implys occupancy.

Acquiſitions are either original or derivative.

XII. When I ſay, that property can be no otherwiſe acquired, but by diviſion or by occupancy, I muſt be underſtood to mean, that original acquiſitions can be made in no other way. Our acquiſitions of property are divided into original and derivative. Original acquiſitions are ſuch as introduce or begin property in

things

things, which were before in common or had no owner. Derivative acquiſitions are ſuch, as convey the property of things from one man to another: the things which are ſaid to be alienated by the old proprietor, are derivatively acquired by the new one.

'We may obſerve by the way, that original acquiſitions are made not only of ſuch things, as never had an owner, but of ſuch things likewiſe, as have had an owner, and by the ceaſing of his property are become common again. Derivative acquiſitions are but continuations of the ſame property in a different perſon. When therefore the property in a thing has ceaſed, or been interrupted, the thing returns into the common ſtock: and whoever acquires it afterwards, begins or introduces a new property in it; juſt as if it had never before been in property at all.

XIII. [c] Property is of two ſorts, either general or particular. By general property is here meant the right, which a body of men have to a thing, excluſive of the reſt of mankind: and by particular property is meant the ſame excluſive right in an individual. General property is acquired by a general occupancy, or by occupancy in the groſs. A number of men, uniting themſelves into a collective body, are ſeeking for a place to ſettle in, and finding a large tract of land uninhabited, they ſeize upon it, and ſettle there. By ſuch an act of occupancy the whole country becomes the property of this body of men. Though no ſingle perſon in the body has a right to exclude any other ſingle perſon, in the ſame body, from the uſe of any ſpot within the whole tract of land ſo ſeized upon; yet all and each have an excluſive right to the whole, and

Property either general or particular.

[b] Grot. ibid. § XIX. [c] Grot. ibid. § IV.

to

to every part of it, in reſpect of all other individuals who are not members of this body, and in reſpect likewiſe of all other collective bodies whatſoever.

After ſuch a general property has been introduced in the whole tract of land, where this body of men has ſettled; ſomething farther is requiſite to give the individuals, of which the body is compoſed, particular property in the ſeveral parts of this tract. This particular property is introduced either by expreſs diviſion and aſſignment, or elſe by particular occupancy; that is, either the body by expreſs agreement divides the whole country into parcels, and aſſigns to each individual the parcel, which is to be, and which is thus made, his own; or elſe the body allows the individuals to ſeize upon ſuch ſpots or parcels of land, as they like beſt, and gives them, or rather allows them to have, an excluſive right to theſe ſpots or parcels ſo ſeized upon.

How far property ceaſes by dereliction or by extinction of the proprietors.

XIV. [f] Property in goods may ceaſe two ways. It ceaſes, when the owners relinquiſh their right without transferring it to any one: and it ceaſes likewiſe, when the owners are extinct, that is, when no perſon is left, who has any right to the goods. Property in goods ceaſes by the owners dereliction of them; becauſe, as no one elſe had any excluſive right in them, upon his dereliction or quitting his claim, no one at all has any excluſive right in them; and conſequently they become common to all alike. Property in goods ceaſes, when the owners of them are extinct; becauſe property and a proprietor are relative terms, ſo that one of them cannot ſubſiſt without the other: property is the excluſive right, which a perſon has to ſuch

[f] Grot. L. II. C. IX. § I.

goods,

goods, as are, upon account of this excluſive right, called his own, or his property; if therefore the perſons, who had ſuch right, ceaſe to exiſt, the goods are no longer the property of any one.

It is poſſible however, that goods, which are relinquiſhed by their owners, or goods, which ceaſe to have any particular owner, may not ſo far become common, as that any perſon, who pleaſes, is at liberty to ſeize upon them, and by ſuch occupancy to gain property in them. Where a body of men have ſeized upon a tract of land in the groſs, and have by ſuch occupancy acquired a general property in it; if the individuals, of which this body is compoſed, acquire private or particular property afterwards in the ſeveral parts of this land, either by an expreſs diviſion and aſſignment made by the collective body, or by particular occupancy with the allowance and conſent of ſuch body; then upon the dereliction or failure of theſe particular owners, the land returns into the ſtate, in which it was before thoſe individuals had acquired particular property in it; that is, it again becomes the general property of the collective body. No perſon therefore is at liberty to ſeize upon ſuch parcels of land, as have thus ceaſed to be in private property: becauſe, though they have no particular owners, they have ſtill a general owner; the collective body has the ſame excluſive right to them, that it had before any of the individuals acquired private property in them.

This principle does not naturally extend to moveable goods. Though the land, and ſuch immoveable goods as adhere to it or may be conſidered as parts of it, were originally ſeized upon by the collective body, and are therefore matter of general property; yet each

individual may well be ſuppoſed to have acquired pro-
perty in many ſorts of goods, before he ſettled with th
collective body upon that particular tract of land.
What plate or jewels, what money or cloaths he brough
with him, are his own; they are not parts of the land,
and can ſcarce be ſuppoſed to have been acquired wit
it. If he had catched and tamed cattle for his uſe; hi
right to his ſheep, or horſes, or oxen, which he ha
ſo catched and tamed, is not derived from the col-
lective body; theſe goods were his own, not onl
before he ſettled with ſuch body, but perhaps eve
before he joyned himſelf to it. When therefore ſuc
goods as theſe are relinquiſhed by their owners, o
when the owners of them fail; if the collective body
of which they were members, has any general claim
to the goods; that is, if theſe goods become the pro-
perty of ſuch collective body, ſo as not to be free fo
any perſon, that pleaſes, to ſeize upon them, and mak
them his own; this effect muſt be produced either by
the conſent of the ſeveral owners, or elſe it muſt ari
accidentally from the claim, which the body has to th
land. All foreigners, that is, all who are not mem-
bers of this body, are excluded from ſeizing upon ſuch
moveable goods, as have no owner, and are found
upon that land, in which the body has general pro-
perty: becauſe they have no right to come upon th
land for this or for any other purpoſe of their own,
without leave. So again, when any parcel of land is
returned to the public, upon the failure or derelictio
of the private or particular owners; ſuch moveable
goods, as have likewiſe no owner, and are found upon
that parcel of land, will become the property of the
public: becauſe, as they have property in the land,
no

no individuals, even though they are members of the public, can claim to come upon it in order to ſeize upon thoſe goods, and by ſuch occupancy to make them their own. But where moveable goods having no owner are found upon land, which has an owner; if the owner of the land, being likewiſe a member of the collective body, may not ſeize them, ſo as to make them his property by occupancy, he muſt be precluded by ſome expreſs law of that body. If this law is conſidered merely as a poſitive one, the juſtice of it is to be defended upon the principle already mentioned of its being eſtabliſhed by the conſent or agreement of the ſeveral individuals: or it may be conſidered as declarative, that the public grants out its general property in the land to individuals with this reſerve, that whatever moveable goods having no owner are found upon it, they ſhall be ſeized for the uſe the public, and not of the individuals.

CHAP. IV.

Of the Limitations of Property.

I. *Property limited in reſpect of continuance, uſe, or diſpoſal.* II. *Limitations ariſe from the proprietor, or from ſome other perſon.* III. *Limitations in reſpect of continuance.* IV. *Services, or limitations in reſpect of uſe.* V. *Limitations in reſpect of diſpoſal.*

Property limited in reſpect of continuance, uſe, or diſpoſal.

I. FULL property in a thing is a perpetual right to uſe it to any purpoſe, and to diſpoſe of it at pleaſure. Property, in the ſtrict notion of it, is ſuch a right to a thing, as excludes all perſons, except the proprietor, from all manner of claim upon it. No perſon therefore can, conſiſtently with ſuch a right, take the thing from him at any time, or hinder him in the free uſe of it, or prevent him from diſpoſing of it, as he pleaſes. If any other perſon can claim either to take the thing from him at any certain time, or to hinder him at all in the free uſe of it, or to prevent him from diſpoſing of it, as he pleaſes; he has not, in theſe reſpects an excluſive right to it; that is, his excluſive right, or property in the thing, is ſo far limited. Theſe then are the limitations, to which property is ſubject; they are limitations, in reſpect of its continuance, or in reſpect of the uſe of what we have property in, or in reſpect of the diſpoſal of it.

Limitations ariſe either from the proprietor or from ſome other perſon.

II. A mans property may be limited in any of theſe reſpects, either by his own act, or by the act of ſome other perſon. He limits it by his own act, if he conſents either expreſsly or tacitly to give any one, beſides himſelf, any claim upon what is his. If this is done

done by expreſs conſent, we call it a grant. If it is done by tacit conſent, we call it uſage or cuſtom. His property is limited by the act of another, though not indeed wholly without his own conſent, if he receives a thing by gift, or by purchaſe, and the perſon, from whom he receives it, makes it over to him under limitations. The act of the perſon, who makes the thing over to him, is principally conſidered; becauſe the limitations are made at the motion and diſcretion of that perſon: but yet his own conſent concurs with this act; for he was at liberty to have refuſed accepting the thing under thoſe limitations, if he had thought proper.

Limitations in reſpect of continuance.

III. If lands are granted to a man for a term of years, with full power, whilſt that term laſts, to uſe or to alienate them; he has property in theſe lands, but not full property; he has an excluſive right to uſe and diſpoſe of them, but this right is limited in reſpect of its continuance. If a man grants away the reverſion of his eſtate, and this grant is to take place at his death; he limits his property, in reſpect not only of its diſpoſal but of its continuance too, by his own act. Indeed his property might have ceaſed at his death, though he had made no ſuch grant; yet if it had not been made, there are natural ways, by which, if he pleaſed, he might have continued this property in other perſons, even after his death, to an indefinite time.

Services, or limitations in reſpect of uſe.

IV. Limitations in reſpect of the uſe of things, in which we have property, are called ſervices. If the owner of a thing has not the full and free uſe of it to himſelf, that is, if any other perſon, notwithſtanding his property in it, can claim either to uſe the thing, or to hinder him from uſing it, in what manner he pleaſes;

the thing is then ſaid to be charged with a ſervice due to the perſon, who has ſuch a claim.

It may not perhaps be thought foreign to our preſent purpoſe, to take notice of the effects produced by ſome of thoſe ſervices, which the goods of one man may owe to another. Services may be divided into two ſorts, perſonal and real. [g] Indeed all ſervices, when we conſider them as rights, belong to perſons: but then ſome of them belong to a perſon conſidered ſimply, or merely as a perſon; and theſe are what we call perſonal ſervices, to diſtinguiſh them from others, which belong to a perſon, not conſidered ſimply, or merely as a perſon, but as a perſon poſſeſſed of ſome particular thing. This latter ſort, though they belong to a perſon, as well as the former, yet becauſe they do *rem ſequi*, follow the poſſeſſion of a thing, are called real ſervices.

[h] The principal perſonal ſervice is uſufruct, or uſe and profits, which is a right to uſe the property of another and to enjoy the advantages ariſing from it, without impairing the ſubſtance of the thing ſo uſed and enjoyed. The fruits or advantages of a thing, which is a mans own, naturally belong to the owner of it: he may therefore, if he pleaſes, grant them away, provided they can be ſeparated from the thing itſelf; and yet ſtill retain a right to the diſpoſal of the thing, that is, to the diſpoſal of the ſubſtance of it, which is all, that after ſuch a grant, belongs to him. But it is to be obſerved, that this limitation of property, which is called uſufruct, can take place only in ſuch goods, as can be uſed without being conſumed, ſuch as lands,

[g] Grotius Lib. I. Cap. I. § IV.
[h] Puffend. B. IV. Cap. VIII. § VI, VII, &c.

houſes,

ouſes, ſlaves, horſes, books, &c. For in things, which re neceſſarily conſumed in the uſing, the ſubſtance and he uſe, or the property and uſufruct, if we may ſo all it, are inſeparable from one another. There ſeems owever to be ſomething like a right of uſe and pro- ts different from property, in theſe things, which hews itſelf whenever they are lent. If, when wine, or rain, or money are lent, the full property in them was ransferred by the lender to the borrower, a loan of uch things as theſe would not differ from a gift. And et, in the mean time, if the borrower had no ſort of roperty in the ſubſtance of the thing made over to im, he could not uſe what he has borrowed; becauſe he uſe and ſubſtance are ſo united to one another, that o uſe can be had of ſuch things without breaking in- o the ſubſtance itſelf. Under the article of contracts his matter will be fully explaned. At preſent it will e ſufficient to obſerve, that where things, which can- ot be uſed without being conſumed, are lent; the orrower has a property in the things made over to im by the lender: but then this property is not full and abſolute, it is limited in reſpect of time. His pro- perty continues only during the lenders pleaſure; if no particular time of payment has been fixed: but if there is a fixed time for payment; then the property conti- nues till that time comes. The other ſorts of perſonal ſervices, ſuch as bare uſe, dwelling, work of ſlaves, as the roman law explanes them, are only more re- ſtrained inſtances of uſufruct: and any of theſe are li- mitations in reſpect of uſe upon the property of him, whoſe goods owe ſuch ſervices: he cannot have the full and free uſe of them, where others have any claims of this ſort upon them.

Real ſervices due to any perſon upon account of ſome eſtate, which belongs to him, are certain advantages, which the eſtate of another owes to his: and the other, whoſe eſtate owes ſuch ſervice, is limited as to his property in reſpect of the uſe of it. For if any perſon, beſides himſelf, may lawfully claim to uſe what belongs to him, or if he may be lawfully hindered by any other perſon in uſing it himſelf, he cannot, in either caſe, be ſuppoſed to have the full and free uſe of it. Theſe ſervices are divided into ſervices of city eſtates, and ſervices of country eſtates: But under the notion of city eſtates, the roman law includes not only ſuch, as are actually in a city, but likewiſe all buildings, wherever they are ſituated, which are intended for the habitation of mankind, or for the exerciſe of commerce. Such are the ſervices of bearing a burden; where my neighbour has a right of letting his houſe reſt upon my wall, or my pillar: the ſervice of receiving dropping water; where he has a right of conveying water, through ſpouts or gutters, into my yard: the ſervice of not receiving dropping water; where he has a right to hinder me from turning ſuch ſpouts or gutters into his yard: the ſervice of jutting or ſhooting out; where he has a right to extend his buildings in ſuch a manner, as to hang over my ground: the ſervice of not raiſing a building higher; where he, for the profit or convenience of his houſe, has a claim upon me not to build beyond a fixed height: the ſervice of lights; where I am obliged to admit his making windows into my yard or garden: the ſervice of not hindering lights; when I can raiſe no building upon my own ground, ſo as to obſcure his windows: the ſervice of proſpect; where I am bound

to

to let my neighbour look freely into my eſtate: the ſervice of receiving a water courſe; were I am bound to grant a paſſage to water-pipes through my houſe, for the benefit of his: the ſervice of ſinks; where I am bound for the convenience of my neighbours houſe to ſuffer his ſink to paſs through my grounds. Inſtances of ſervices due from eſtates in the country are path-way, drift-way, and road. A path-way is a right, which my neighbour has, of walking through my grounds, upon account of ſome particular eſtate, which he is poſſeſſed of, and with which this right is connected. Drift-way is a like right not only of walking, but likewiſe of driving his cattle or carriages through them. And a road, is a right of paſſing, going, walking, driving, carrying, or drawing through them, either to a town, or to ſome highway, or to a ferry, or to a bridge, or to ſome eſtate of his own. In theſe and many more inſtances of the like ſort, the uſe of my property is limited: I cannot do what I will with a thing, which belongs to me; becauſe ſome other perſon has a claim upon me to ſubmit to an inconvenience, or not to reap an advantage, which, if there had been no ſuch claim, I ſhould not have ſubmitted to, or ſhould have reaped.

Limitation in reſpect of diſpoſal.

V. Though a man cannot be underſtood to have any property in a thing, when another perſon has a full right to diſpoſe of it, yet property may be conceived to continue, where the proprietor has not a right to diſpoſe of the thing as he pleaſes. This ſeems to be the caſe of an eſtate, which is held in truſt. For though there is commonly another limitation of ſuch eſtates in reſpect of the uſe; by which limitation the truſtee is obliged to diſpoſe of the profits ariſing from

from them to certain purpoſes; yet are they attend
too with a limitation in reſpect of the diſpoſal of the
where the truſtee is no more at liberty to diſpoſe of t
eſtate itſelf at his own diſcretion, than he is to diſpo
of the uſe and profits of it. In the caſe of pledges, t
property of the perſon, whoſe goods are pledged, is l
mited as to the diſpoſal of ſuch goods. Pledges a
ſuch goods, as the debtor puts into the hands of t
creditor, or aſſigns over to him, as a ſecurity, that u
on failure of payment the creditor ſhall have proper
in the thing pledged. If moveable goods are pledge
they are called pawns; if immoveable ones, they a
called mortgages. In both caſes the owners proper
is limited in reſpect of the diſpoſal of the thing, t
the debt is paid; becauſe the creditors right of ſecuri
would be broken in upon, if the debtor was to diſpo
of it.

CHAP.

CHAP. V.

Of our common Right to Things.

What things are ſtill in common. II. *The ocean is not in property.* III. *Some waters admit of property.* IV. *Wild beaſts, birds, and fiſhes are in common till taken.* V. *The right to take wild beaſts, &c. may be reſtrained as to its exerciſe.* VI. *Right of extreme neceſſity ſets aſide property.* VII. *This right is ſubject to three limitations.* VIII. *Right of harmleſs profit on what founded.* IX. *This right is precarious in its exerciſe.*

I.[i] ALL things may be divided into ſuch, as are in common, and ſuch as are in property. Such things are ſtill in common, as either from their own nature never could be appropriated, or though in their own nature they might be appropriated, yet in fact never have been. We will conſider the rights, which belong to all mankind in common, in reſpect of things of each ſort. What things are ſtill in common.

II.[k] The ocean, either as to the whole, or as to the principal parts of it, does not admit of property, but remains ſtill in common to all mankind, notwithſtanding the introduction of property in other things. The firſt reaſon, that we urge in proof of this, is only a moral or probable one. It is not likely, that mankind ſhould ever think of gaining an excluſive right to the ocean; becauſe there was no reaſon for it, no cauſe or motive, which might induce them to it. And though, where an act appears evidently to have been done, we The ocean is not in property.

[i] Grot. L. II. C. II. § I. [k] Grot. ibid. § III.

could

could never diſprove the exiſtence of it by alledging that there was no reaſon for doing it; yet, where it is doubtful whether an act has been done or not, the conclusion is probable, that it never has been done, provided no reaſon can be found, why it ſhould. [l] Now the general reaſon for appropriating other things is that the ſame thing would not anſwer the purpoſes of all the joint-commoners, who might have occaſion to make uſe of it, at one and the ſame time. But the ocean, whilſt it continues in common, is not liable to this inconvenience: it is large enough to anſwer the occaſions of all mankind, either to ſail upon, or to fish in, or to fetch water from. We therefore conclude, that it was never in the intention of mankind to appropriate it, or to acquire an excluſive right in it; becauſe the general reaſon, for acquiring ſuch a right in other things, could in reſpect of the ocean have no weight with them.

We may ſay the ſame of large banks of ſand, which are ſufficient to ſupply all men, who want to uſe the ſand, either for ballaſt, or for any other purpoſe. The ſame reaſoning is likewiſe applicable to the air; as far as any uſe can be made of it, without making uſe at the ſame time of the ſoil or the water.

But beſides this moral reaſon, ariſing from the want of intention in mankind to acquire an excluſive right in the ocean, there is a natural one, which ſhews, that no ſuch right ever could be acquired. [m] Occupancy cannot proceed ſo as to give property, unleſs in ſuch things as are certain and determinate. The ſoil or land, though the parts of it are in continuity or joyn

[l] See Chap. III. § V. [m] See Chap. III. § VIII.

to

one another, is diſtinguiſhed into parcels by hills mountains, by brooks or rivers: and where theſe atural boundaries are wanting, parcels of it may be iſtinctly ſet out by fences, or plantations, or other rtificial land-marks. But the ſurfaces of fluids are, in heir own nature, ſo ſmooth and yielding, as not to dmit of being diſtinguiſhed into parcels, by any ſuch atural or artificial boundaries. If they are thus ſet out t all, it muſt be by the banks or ſhores, in which hey are contained. Now the ocean is not contained within banks or ſhores: for it rather encompaſſes the and, the continent as well as what are commonly alled iſlands, than is encompaſſed by it. The natural ncertainty therefore of the thing, both as to the whole of it, and as to its principal parts, renders it incapable of being appropriated by occupancy. Mariners indeed and geographers divide and ſet it out by the artificial meaſure of degrees in latitude and longitude. But as theſe are not laſting and viſible limits; they cannot ſo diſtinguiſh the ocean into parcels, as that one part of mankind ſhould be able to find out what another part deſign to make their own, without expreſs information; and conſequently they cannot make the ocean capable of being appropriated; unleſs all the parties were to meet, and enter into an expreſs agreement about ſettling the limits of each others property. Such an agreement as this is what we call diviſion. But if property in the ocean cannot be introduced any other way than by diviſion, no property can be introduced in it at preſent, [n] as has been ſhewn already. And formerly, whilſt mankind were few, and lived near together, ſo that they could readily meet, the ocean, or however

[n] See Chap. III. § IX.

far

far the greateſt part of it, was unknown to them, a
conſequently could not, at that time, be meaſur
divided, and, aſſigned. Since therefore property in t
ocean could not be introduced either by occupancy
by diviſion, the neceſſary conſequence is, that it is n
capable of being appropriated at all.

Some waters admit of property.

III. The caſe of [o] rivers, bays, ſtreights, pools, a
lakes is different from that of the ocean. For though
as fluid bodies, they are not ſet out into certain an
determinate parcels by any marks or limits upon thei
ſurface; yet as they are contained within banks or ſhore
which are near to one another, they are by this mean
made certain and determinate enough to admit of pro-
perty by occupancy.

Wild beaſts, birds, and fiſhes, are in common till taken.

IV. [p] Many things, which in their own nature admit
of occupancy, ſo that an excluſive right to them may
be acquired, have yet in fact never been appropriated,
becauſe no one has ſeized upon them for this purpoſe.
Of this ſort are wild beaſts, birds, and fiſhes, which
have never been caught, or after they are caught, have
eſcaped from us; iſlands, which are uninhabited, or
ſuch tracts of land, either in iſlands or on the continent,
as no perſon has yet ſettled upon.

As to wild beaſts, birds, or fiſhes, ſince they are part
of the common ſtock, any perſon may of common
right take them for his own uſe or diverſion; and occu-
pancy without interruption will give him property in
them. But then this property is very precarious; be-
cauſe it continues no longer than poſſeſſion. Whenever
ſuch animals have made their eſcape, the natural pre-
ſumption, upon account of their wildneſs, is, that they
can be recovered no more: and conſequently their for-

[o] Grot. L. II. C. III. § VII. [p] Grot. ibid. § V.

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er owner muſt in all reaſon be underſtood to give em up or relinquiſh them. This property however, precarious as it is, ſeems to be more, than the mere ercise of a common right to take and to uſe them: ecauſe, if he, who takes them, can make them tame, that by loſs of poſſeſſion he does not loſe all proſpect recovering them, his property in them will be fixed, ven after they have eſcaped from him; and he may laim them wherever he finds them. And it farther appears that the right to ſuch animals, when they are taken, more than a common right to part of a joint-ſtock; ecauſe no reaſon can be given, in the nature of the hing itſelf, why any perſon may not take more ſuch nimals, than he wants for his own uſe: and as long as e can keep poſſeſſion, what he has ſo taken are his own o diſpoſe of in any manner, that he pleaſes. His right herefore, whilſt poſſeſſion continues, is not merely a ight to uſe, but an excluſive right of property.

V. But though no reaſon, in the nature of the thing, can be given, why any perſon may not lawfully take as many of theſe wild animals, as he will; yet his right of taking them at all is limited, by a reaſon drawn from the conſideration, that other men have property in ſuch things, as he muſt make uſe of in order to take them. No man can hunt, or fiſh, or fowl, without uſing the ſoil or the water. If therefore others have an excluſive right to the ſoil or the water, which he has occaſion to make uſe of in following theſe diverſions; as he cannot claim to uſe their property, he cannot juſtly claim the liberty of hunting or fiſhing or fowling, on ſuch lands or ſuch rivers as belong to them. It may perhaps be aſked how he can juſtly be hindered from exerciſing a right, which he enjoys by the law of nature,

The right to take wild beaſts, &c. may be reſtrained as to its exerciſe.

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a right of taking and uſing, or even of appropriating ſuch animals as do not belong to any one; ſince ſuch hindrance or interruption ſeems inconſiſtent with the law of nature? But to this we reply, that fiſhing, hunting, or fowling are originally matter of natural right, not becauſe the law of nature commands them, but becauſe it does not forbid them. Now though no act of man can take away the liberty of doing what the law of nature commands; yet there is nothing, that can prevent ſuch act from taking away the liberty of doing what the law has left indifferent; provided the parties, to whom ſuch liberty belongs, give their conſent to it. This in reſpect of hunting, fiſhing, or fowling, though it was not done expreſly, was done tacitly and of neceſſary conſequence by the introduction of property in the ſoil or the water. For it is unintelligible to ſuppoſe, that one man has an excluſive right in the ſoil or the water, and yet that another may uſe them, if he pleaſes, to theſe purpoſes. To give any other perſon beſides the proprietor ſuch a claim, after property is introduced, ſome reſerve muſt be ſhewn, and an expreſs reſerve too, of this liberty: for otherwiſe the common or general liberty of uſing the ſoil or the water for the purpoſes of hunting, fiſhing, or fowling, is as effectually given up by the introduction of property, as the general liberty of uſing them to any other purpoſe whatſoever.

Right of extreme neceſſity ſets aſide property.

VI. [g] It may ſeem ſtrange, that we ſhould enquire, whether all mankind can in any circumſtances or in any inſtances claim of common right to make uſe of ſuch things, as are appropriated to particular perſons. For ſince property is an excluſive right to the things appropriated;

[g] Grot. ibid. § VI.

propriated; it ſeems to have wholly ſuperſeded theſe common claims of mankind. We ſhall however find upon enquiry, that the fact is otherwiſe, and that in ſome circumſtances our common right to the uſe of things remains, even after thoſe things have been appropriated, and have their diſtinct and reſpective owners.

Grotius maintains, that there are two inſtances of ſuch a common claim: the firſt he calls the right of extreme neceſſity; the latter the right of harmleſs profit. In ſupport of the right of extreme neceſſity we may urge with him; that when mankind firſt agreed to divide the common ſtock amongſt them; or when afterwards they ſuffered any one to acquire property by occupancy; if they had been aſked, whether they conſented ſo effectually to exclude themſelves from what they agreed to appropriate, as never to claim any uſe of it, even though it ſhould be abſolutely neceſſary to their own preſervation? It is moſt likely they would have anſwered, that they intended no ſuch thing, but agreed to the introduction of property for the convenience of all, and not for the deſtruction of any. And ſince the claim, which the proprietor of a thing has to it, depends upon the conſent of mankind; this claim muſt be ſubject to all the limitations, which they deſigned to lay it under, and can extend no farther, than they deſigned it ſhould extend.

We may urge in ſupport of the ſame right of extreme neceſſity, that no compact, either expreſs or tacit, could ſo introduce property, as to be binding without ſuch a limitation. For ſince the right, which a man has to his life is unalienable; as will appear hereafter; he cannot alienate the natural right, which he has to the neceſſary means of his own preſerva-

tion. However therefore mankind may have consented, that particular things ſhould be poſſeſſed in property by particular perſons; yet in whatever reſpect ſuch things become abſolutely neceſſary for the preſervation of individuals, they ſtill continue in common. So that extreme neceſſity ſets property aſide, and makes it lawful for perſons, who labour under ſuch neceſſity, to uſe thoſe things, in which others have property, as if the things were ſtill in common. Thus where a man muſt have ſtarved otherwiſe, it is naturally no theft, if he takes victuals, which is not his own: becauſe, though the owner of what is ſo taken has, in reſpect of all other men, an excluſive right to it; he has no ſuch right in reſpect of the neceſſitous perſon. You may ſay indeed, that it is not the property of the poor man, who takes it: which we readily allow. But then we contend, that, in reſpect of him, it is not the property of the perſon, from whom he takes it. If it was, you might eaſily prove this act to be theft, unleſs the owner conſented to his taking it: becauſe theft conſiſts in taking away the property of another without his conſent. But you ſhould obſerve, that where there is no property, there can be no theft. And if, in order to prove the poor mans act to be theft, you will aſſume, that the perſon, from whom the thing is taken, has property in it; you either take the matter in queſtion for granted, or elſe you are guilty of a fallacy. If, when you aſſume, that the perſon, from whom the thing is taken, has property in it, you mean, that he has property in reſpect of the poor man; or that, as the owner has a right to exclude all others from the uſe of the thing, ſo he has likewiſe the ſame right to exclude him, you take the matter in

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ueſtion for granted. But if, when you aſſume this in eneral, you mean only, that he has property in reect of all others, you are guilty of a fallacy; you have hore in your concluſion, than is contained in your preniſes: you aſſume only, that he has property in reect of ſome, and conclude, as if he had property in eſpect of all.

To this head we may likewiſe refer the right, which ve have, in caſe of fire, to pull down our neighbours houſe in order to preſerve our own; the right, which ve have to cut the mats or cables of another man, where our own boat is entangled with them, and muſt otherwiſe ſink; the obligation, on ſhip-board, which ach perſon is under, in a ſcarcity of proviſions, to bring out his own ſtock and to leave it in common; the ight, which in a ſtorm all, who are on board, have to demand that each perſon ſhall throw ſo many of his goods into the ſea, as would overburden the ſhip; and laſtly the right, which a nation at war has to ſeize upon and garriſon a place of ſtrength, in a neutral country, when it is morally certain, that the enemy would otherwiſe get poſſeſſion of it, and by that means be enabled to do them irreparable damage. For though, in ſome of theſe inſtances, the preſervation of life may ſeem not to be immediately concerned; yet at leaſt the reaſon, upon which Grotius ſupports the right of extreme neceſſity, is applicable to all of them. It is not probable, that mankind, when they conſented to introduce property, ſhould deſign to extend that claim to caſes, wherein ſuch an excluſive right would force them to ſuffer what is beyond the ordinary patience of human nature.

The right of extreme neceſſity is ſubject to three limitations.

VII. [r] This right of extreme neceſſity is ſubject to ſuch reſtrictions, as will keep it from being abuſed, and from being made a pretence to encroach upon the property of others, where we have no claim. The reſtrictions are theſe three, which follow.

Firſt, all other methods are to be tryed, as far as the neceſſity will allow of, ſuch as a requeſt to the owner or an application to the magiſtrate, before we make uſe of ſuch things, as are the property of another. The reaſon of this reſtriction is evident. No neceſſity can be called extreme, or in effect there is no neceſſity at all, where our occaſions or calls may be anſwered by the uſe of ſuch means, as are in our power. Indeed in our own country where the civil laws have provided for the poor, there can be no neceſſity, which the rigor of the law will allow to be a ſufficient ground for taking and uſing ſuch food or ſuch cloathing, as are the property of other perſons: becauſe as the law has made a proviſion for the ſupply of ſuch wants, it cannot ſuppoſe them ever to happen. And yet if, in the execution of the law, it ſhould appear, that, notwithſtanding the legal proviſions to the contrary, in ſome particular inſtance ſuch an extreme caſe has happened, the magiſtrate would be wanting in natural equity, if he did not mitigate the rigor of the law againſt theft, as far as he is able.

A ſecond reſtriction of this right of extreme neceſſity is; that it fails, whent he proprietor is under as great neceſſity, as the other claimant. For where the neceſſity is equal on both ſides, the claim of the poſſeſſor is the better of the two: becauſe the effect of neceſſity is only to overrule the right of property, and to make

[r] Grot. ibid. § VII. VIII. IX.

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the thing in queſtion common to the parties concerned. But in the exerciſe of our right over ſuch things as are in common, where the parties equally want to uſe them, the firſt occupant has the beſt right to uſe them firſt: and in the caſe now before us, the poſſeſſor ſtands in the place of the firſt occupant.

A third reſtriction is; that where we have taken things, which were not our own, and have uſed them, in virtue of this right of extreme neceſſity, we are obliged, if it ever is in our power, to make amends to the owners of them. This reſtriction ſeems to be ſo inconſiſtent with the right, for which we have been contending, that ſome have imagined we muſt either give up the reſtriction, or give up the right. If I have a right to uſe the goods, which my neceſſity calls for, where can be the obligation to reſtitution? ſince all obligations of this ſort imply, that I have injured another by taking from him what I had no right to. Upon ſuppoſition therefore of a right to uſe ſuch goods, there can be no obligation to make amends for it. Or if on the other hand we will contend, that there is an obligation to make reſtitution, we muſt allow, that the perſon in neceſſity had no right to take and to uſe the goods which he ſtood in need of. But to this we may anſwer, that a right to take and to uſe ſuch goods, as we cannot do without, and an obligation to make reſtitution for the exerciſe of that right, are indeed ſo inconſiſtent with one another, that they cannot poſſibly ſubſiſt at one and the ſame time. So long as my right ſubſiſts, I can be under no obligation to make reſtitution upon account of my exerciſing that right. But then they are not ſo inconſiſtent, as to prevent them from ſubſiſting at different times. My right

ſubſiſts as long as the neceſſity continues, which the foundation of that right; and ſo long there is obligation to make reſtitution. But as ſoon as my ceſſity ceaſes, the foundation of my right is taken aw and conſequently my right ceaſes with it. And it is th and not till then that the obligation to reſtituti begins.

Right of harmleſs profit on what founded.

VIII. [s] The right of harmleſs profit is the right uſing another mans property for our benefit, wh the owner ſuffers no harm by our uſe of it. T right may be eaſily made out in theory; but when come to the exerciſe of it, we ſhall find it ſo prec rious, as to be in effect no right at all. To ſuppo this right, we muſt look back to the general reaſ for introducing property, which was the impoſſib lity, that the ſame thing ſhould at one and the ſa time anſwer the uſes, which all or many might ha for it. Now the claim of property or the excluſiv right to a thing extends no farther, than the inte tion of mankind extended, when they introduced it and their intention cannot be underſtood to have e tended any farther, than the motive or reaſon, whic engaged them to introduce it. Therefore one man property in a thing does not exclude anothers right o harmleſs profit: becauſe this right takes place in thoſ inſtances only, where the owner ſuffers no harm, tha is, in thoſe inſtances only, where the thing will anſwe all the purpoſes of the proprietor, notwithſtanding th uſe, which the other makes of it.

Such right is precarious in its exerciſe.

IX. But this claim, as well as it may ſeem to be eſtabliſhed in theory, will be found, as to the exerciſe of it, to depend upon the will and conſent o

[s] Grotius, ibid. § XI. &c.

thoſe,

thoſe, who have property in the goods, that we have occaſion to make uſe of for our own benefit. No right of this ſort can be pretended, unleſs where our uſe of what is another mans property will do him no harm. But the proprietor himſelf muſt determine, how far ſuch uſe of his goods will be harmleſs: becauſe his right in the goods would have no effect, or would be no right if he could not exclude us from uſing them, whenever we pretend, that he will receive no damage from ſuch uſe. If therefore he is to determine, how far he is likely to ſuffer any harm by the exerciſe of our right, before we can claim to exerciſe it; we cannot make uſe of his goods in virtue of ſuch right, till we have his conſent. This is planely in effect no better than no right at all: becauſe where there is no pretence of a right to uſe the goods of another man, we may in any inſtance lawfully uſe them, if he gives his conſent.

We may be farther informed about the precarious nature of this right, as to the exerciſe of it, if we go on to examine ſome of the principal inſtances of it, which Grotius has mentioned. Thoſe, ſays he, who have occaſion for a paſſage over our land or upon our rivers, either to ſeek a new ſettlement, when they are driven from their own country, or to carry on any commerce, or to recover by a juſt war what has been taken from them, or for any other lawful purpoſe, have a claim to ſuch paſſage. Let us ſee therefore, how far ſuch a demand can be juſtly ſupported againſt the proprietor. A nation, which has juriſdiction over the ſoil or water, or which has property in them, might object in particular to the paſſage of an army, that they are afraid of ſuffering ſome irreparable damage, if they were to

allow ſuch a number of armed men to come amongſt them. To this difficulty Grotius replys, that your fears cannot take away my right. But it is to be obſerved, that though ſuch a general anſwer might be ſufficient in other caſes, yet it cannot remove the objection, which is urged, in the preſent caſe: becauſe no uſe of my property can be called harmleſs to me, if it expoſes me to ſuch loſſes, as I ſhould have been in no danger of ſuffering without ſuch uſe. It may be true, that my fears cannot take away your right: but then it cannot be true without an exception of thoſe caſes, in which the very being of your right depends, as this of harmleſs profit does, upon my ſecurity. Perhaps indeed, even in this ſort of right, it might be more proper to ſay, that my fears prevent your right, than that they take it away. But which ever of theſe two expreſſions is the more proper, the effect is the ſame: there cannot be any right of harmleſs profit over the property of another man, where the owner has good reaſon to apprehend, that he ſhall be a loſer by the exerciſe of ſuch a right. Our author however urges farther, that ſufficient caution may be given to the owner to indemnify him againſt any loſs, that he may be apprehenſive of: he may, in the inſtance now before us, inſiſt, that the army ſhall paſs in ſmall companies, that the men ſhall not be armed, that a guard ſhall be hired for him at their expence, and that hoſtages ſhall be put into his hands, as a ſecurity for their good behaviour in their paſſage. Now the neceſſity, which our author allows there may be, for taking ſuch cautions as theſe, and the right, which the proprietor has to inſiſt upon them, planely proves, that without this ſecurity, there would be no

claim

laim to uſe his property. But ſince ſufficient caution a vague thing, and ſince the proprietor alone can be he judge what caution is ſufficient; he has ſuch an pportunity of diſappointing this right, in the exerciſe f it, as makes the right itſelf not worth having.

But Grotius goes one ſtep farther, and maintains, hat men have not only a right to demand ſuch a aſſage for themſelves, but for their goods too; when hey want to carry on any trade or commerce: be- auſe, as ſuch an intercourſe of any one nation with ny other is for the general good of mankind, we an have no right to hinder it. But this reaſon, if we llow it all its weight, can only prove, that by hinder- ng this intercourſe we ſhall not contribute ſo much as we are able to the general good of mankind. And if his be all, the right of paſſage is only a right of he imperfect ſort; and they, upon whom it is made, are at liberty to judge for themſelves, how far it is convenient for them to allow it to take effect. How can we in this inſtance, ſays our author, be properly ſaid to ſuſtain any damage by their paſſage; ſince whatever benefit we might be able to make by carrying on that trade excluſively, which they want to have a ſhare in, it is ſuch a benefit, as we could only hope for, and not ſuch an one, as we could claim of ſtrict right. But, whether the loſs of ſuch a benefit can be called in ſtrictneſs of ſpeaking a damage or not, is not worth enquiring. Perhaps it is not properly a damage. Yet certainly if the ſituation of our country is ſuch, as gives us an opportunity of carrying on any branch of trade excluſively, by denying others the uſe of our land or the uſe of our rivers; they cannot claim ſuch uſe as a matter of harmleſs profit: because

becauſe whatever will make our property leſs b[illegible] neficial to us can never be reaſonably looked upon [illegible] harmleſs to us.

We are obliged likewiſe, as our author adds, to a[illegible] low thoſe, who are paſſing by us, to ſtop for a whi[illegible] and even to build extemporary huts, or pitch tents [illegible] if they have occaſion to ſtop in this manner for t[illegible] recovery of their health: for this is to be reckon[illegible] amongſt the harmleſs uſes, which they may have fro[illegible] our property. But certainly it is not univerſally tru[illegible] that ſuch an uſe of our property will be harmleſs to u[illegible] Suppoſe, for inſtance, that they ſhould be ill with t[illegible] plague, or with any other infectious diſtemper; thei[illegible] ſtopping amongſt us would not be harmleſs. We mu[illegible] therefore be allowed, at leaſt, to have a right of bein[illegible] ſatisfyed, whether their diſtemper is infectious or no[illegible] before they can claim to ſtop for the recovery of thei[illegible] health. And if they cannot claim, till we are ſatisfie[illegible] of this; their right will be ſo vague and ſo much i[illegible] our power, that it can only be reckoned amongſt th[illegible] imperfect ones.

CHAP[illegible]

CHAP. VI.

Of derivative acquiſitions, by the act of man.

I. *Derivative acquiſitions are of two ſorts.* II. *Mutual and notifyed conſent of parties neceſſary in thoſe made by the act of man.* III. *An alienation may be revoked before acceptance.* IV. *Acceptance may go before alienation.* V. *Property may be continued after death by a will.* VI. *Aliens how incapable of inheriting by will.*

I. [t] DErivative acquiſitions are made either by the act of man or by the act of the law. Where the property, which one man has in a thing, is transferred to another; either the owner transfers it with his own conſent, and then he, who acquires it, makes a derivative acquiſition by the act of man; or elſe the law takes the property in the thing from one of them, and gives it to the other, and then he, to whom it is ſo given, makes a derivative acquiſition by the act of the law. When the property in things paſſes from one perſon to another by the act of the former, he, who ſo parts with the things is ſaid to transfer or alienate them, and he, to whom they are ſo transferred is ſaid to acquire them.

Derivative acquiſitions are of two ſorts.

II. [u] The proprietor or owner of a thing, when the law does not interpoſe to take it from him, cannot ceaſe to have a right in it, unleſs he deſigns to part with it: an injury is done him, if it is taken from him without his own conſent. On the other hand, no property in a thing can be acquired without the deſign or conſent

Mutual and notifyed conſent of parties neceſſary in derivative acquiſitions by the act of man.

[t] Grot. L. II. C. VI. § I. [u] Grot. ibid. § I. II.

of

of him, who makes the acquiſition; nothing can become his own, unleſs he has a mind to make it ſo. From hence it follows, that in all derivative acquiſitions by the act of man, a deſign or conſent to alienate the thing is neceſſary on one part, and a deſign or conſent to accept it is neceſſary on the other part.

But beſides the mere conſent of parties on both ſides, it is farther neceſſary, that this conſent ſhould be ſufficiently made known or ſignified by ſome outward ſign or mark, ſuch as words, or actions, or both. For a conſent, which does not appear, can no more fall under the notice of mankind, than a conſent, which does not exiſt: and conſequently the law of nature cannot allow, that, in reſpect of mankind, a conſent or intention, which reſts in the mind only, and is not ſufficiently declared, ſhould produce any effect: ſuch intention being as if it had never been, the property in a thing can neither be transferred nor acquired by it.

An alienation may be revoked before acceptance.

III. But ſince the declared conſent both of the giver and receiver is neceſſary, before any derivative acquiſition can be made by the act of man; it follows, that, though the giver has declared his conſent, and ſo has done all, that was neceſſary on his part, towards alienating his property; yet ſuch alienation may be recalled at any time, before acceptance is declared on the other part: becauſe, till acceptance is declared, the party, to whom the giver deſigned to alienate his property, has no claim upon it. Perhaps it may be thought, that, notwithſtanding one of the parties gains no claim to the thing for want of acceptance, yet the other party has, by alienating it, as far as was in his power, loſt his claim to it. But in order to clear up this miſtake,

we

e ſhould take notice of the difference between dere-
ction and alienation. Dereliction is the abſolute giving
p of property: ſo that he, who relinquiſhes what is
is, loſes his right in it, though no other particular
erſon acquires that right. But alienation is the giving
p of property for the uſe or benefit of ſome other
articular perſon, or in order that this other perſon
nay acquire property in it: ſo that if he, for whoſe
enefit the thing was to have been alienated, fails of
cquiring property in it, the alienation produces no
ffect, or is as if it had never been. He who made the
lienation had no deſign of quitting his claim, but in
rder that a certain perſon might acquire it: and con-
ſequently, if this perſon, either through his own default
r by any other accident, does not acquire it, his pro-
perty continues in him, as it was before; this being
he only purpoſe, for which he had any deſign of part-
ing with it.

Acceptance may go before alienation.

IV. When the property of one man paſſes by his own act to another; the moſt natural order is, that acceptance ſhould follow alienation. But this order, though it is moſt natural, is not neceſſary. For acceptance is ſometimes underſtood to have been made before alienation; ſo that the transfer is complete immediately upon alienation, and cannot juſtly be recalled, though no acceptance ſhould follow it. If I aſk for a thing, I am plainly willing to accept it: and if, upon my aſking, it is given me, the transfer is complete without any farther acceptance: becauſe I am underſtood to be ſtill in the ſame mind, as when I aſked for it, unleſs I expreſly declare the contrary.

V.

Property may be continued after death by a will.

V. From the power, which a man has of alienating his property, in what manner and upon what condition he pleaſes, it follows, that he may naturally prevent his property from ceaſing upon his death by making a will, and diſpoſing of it in his life-time.

He, who has full property in a thing, may alienate it, either abſolutely or conditionally. As far as the law reſtrains him from doing this, his property is not full but limited. As he may alienate it conditionally, ſo likewiſe, for the ſame reaſon, he may chuſe his own conditions. Amongſt other conditions, which he might have choſen, ſuppoſe him to chuſe, that the alienation ſhall ſo depend upon the event of his own death, that whatever he ſays or does towards alienating his property ſhall be underſtood to be complete on his part, when this event happens, and not before. The effect of ſuch a condition would be, that he might recall the alienation at any time before his death; becauſe the transfer is ſo far from being completed by any acceptance on the other part that the alienation itſelf is not complete on his part till this event happens. And if ſuch a conditional alienation may be recalled, at any time before his death, a new diſpoſition of the thing ſo alienated may be made; he may, notwithſtanding what he has done already, make a like conditional diſpoſition of it to any perſon, that he pleaſes, or he may ſell it, or he may give it away abſolutely. It is plain therefore, that if he retains ſuch a right in the thing, after it is thus conditionally alienated, ſuch an alienation is ſo far from being inconſiſtent with his property in it, that it does not ſo much as reſtrain or limit ſuch property.

Grot. ibid. § XIV.

Now

Now an alienation of the ſort that I have been ſcribing is a will or teſtament. For a will is nothing ore than a conditional alienation, which is to take lace upon the event of the teſtators death, without ffecting his property in the thing diſpoſed of, till this vent happens. Suppoſing therefore property to be troduced, the right of making a will and of diſpoſing f the things, in which we have property, by ſuch will aturally follows from it.

However we are to obſerve, that this right may not nly be regulated, but may even be taken away, either y expreſs compact, or by civil law. But then, as far s it is either reſtrained or taken away, our right of roperty is limited: becauſe, as has been ſeen already, he right of making ſuch a conditional alienation is eceſſarily included in the right of full property.

Perhaps it may be aſked at what time the property n a thing deviſed by will is alienated by the teſtator. t does not appear to be alienated before his death; if we have given a true account of the nature of a will: nd it cannot be alienated after his death; becauſe fter he is dead, he has no power of acting at all, ſo as to alienate his property or to do any thing elſe. Nor can we properly ſay, that it is alienated at the very inſtant, when he dies: ſince the will, which is the inſtrument, whereby he makes the alienation, was made before that inſtant. The fact is, that the alienation was made before his death, but made conditionally: he conſented to transfer his goods to the perſon, whom he appoints to be his heir, upon conditon of his retaining the full property in them, till the time of his death, and of the heirs claim not taking place till this event happens. Now this latter condition ſuſpends

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the effect of his alienation, or renders it incomplete till the event of his death: it was indeed ſo far perfect on his part, that after the will was made, there was no occaſion for any farther act of his to make it more perfect; nothing was wanting, but that the event ſhould happen, upon which the heirs claim, given him conditionally before, was to take place and become abſolute.

It ſeems indeed to be neceſſary by the law of nature, that the heirs acceptance, without which he acquires no property in the thing deviſed by will, ſhould be made before the teſtators death. There will otherwiſe be an interval of time paſs, in which the goods will have no owner, and conſequently will be open to the firſt occupant. This interval of time is what paſſes between the teſtators death and the heirs acceptance. The teſtator has then no property in the goods, becauſe he is not in exiſtence: and the heir has no property in them for want of acceptance. The occupant therefore, who is ſome third perſon, cannot naturally be ſaid to injure any one, by ſeizing upon ſuch goods. From hence it appears, that if a will obtains its effect, where the heir has not accepted, before the death of the teſtator, it muſt either be accidentally, becauſe no third perſon has been before-hand with the deſigned heir in ſeizing upon the goods; or elſe the will muſt owe its effect to the aid of ſome poſitive law, beſides the mere will or appointment of the teſtator, which law takes the cuſtody of the goods, upon the death of the teſtator, and hinders all perſons from ſeizing upon them, till it appears, whether the heir will accept or not. We cannot ſuppoſe the teſtators will to be of itſelf ſo far binding upon all mankind, as to become a law to them,

and

nd hinder them from ſeizing upon the goods deviſed y it; ſince it is well known, that this will is no aw even to the heir appointed in it, till he has ac- epted.

However no acceptance of the heir before the eſtators death will ſo far bind the teſtator, as to make t naturally unlawful for him to make another will and ppoint a different heir. For the heir can accept only pon ſuch terms, as the teſtator offers: and the terms f a will are; that the goods deviſed to you ſhall be ours upon the event of my death, under this reſtric- ion, that in the mean time the full property in them hall be mine: my deſign is to retain a right to diſpoſe f them, as I pleaſe, till the event of my death hap- ens; but if in the mean time I make no other diſpo- ition of them, immediately upon that event they are ours. If the heir accepts upon theſe terms in the teſtators life-time, though ſuch acceptance is ſufficient to make the goods his property at the teſtators death, without any ſubſequent acceptance; yet, in the mean time, the conditions annexed to the teſtators alienation are ſuch, as will leave the goods in his power to diſ- poſe of in what manner he ſhall think fit, as long as he lives.

Whenever I ſpeak hereafter of the power of diſpo- ſing of our goods by will, as naturally incidental to the right of property, without the aid of civil laws; the reader muſt remember, that I mean a will, under the circumſtances juſt now deſcribed, where the heir has accepted before the teſtators death.

VI. Though the right of making a will is inciden- tal to property, and conſequently is coeval with it; yet ſuch property in goods, as enables a man to give them

Aliens how incapable of inheriting by will.

them away by will, muſt be full property, at leaſt it muſt not be limited in reſpect of the diſpoſal. There is one natural limitation of this ſort not much attended to, which will prevent a will from obtaining any effect. When the occupancy of land and of all its appendages was made in the groſs, ſo that the general property is conſidered as veſted originally in that body of men, by which ſuch occupancy was made; particular property is derived from thence to each individual, as he is a member of this collective body. But what belongs to a man, as he is a member of ſuch body, cannot be his to diſpoſe of to any perſon, who is not a member of the ſame body. He cannot tranſmit his property upon any other terms beſides thoſe, upon which he received it: and conſequently, as the property, which he has in the land, was derived to him from the community, under the qualification of his being a member of it, he cannot tranſmit that land to any perſon, who has not the ſame qualification. This is a natural bar againſt an aliens inheriting land by will: the bar may be conſidered as ariſing rather on the part of the teſtator, than on the part of the alien; it ariſes rather from a limitation in the teſtators property, in reſpect of his right to diſpoſe of the land, than from any incapacity in the alien to accept what the other deviſes to him. Where the teſtator has full property, as he has in his moveable goods, which are conſidered as of his own original acquiſition, and not as derived from the general property of the community; ſuch goods are naturally in his own abſolute diſpoſal, and he can tranſmit them as effectually to a ſtranger, as to one, who is a member of the ſame community with himſelf.

ſelf. But then, though ſuch goods as theſe are naturally in the teſtators diſpoſal, he may, notwithſtanding this, be prevented by the civil law from diſpoſing of them to an alien at his own diſcretion. For as the community has a general property in the land, where ſuch goods are, it may hinder an alien from coming to fetch them away upon any other terms, than what ſuch community ſhall agree upon. The only difference then in this reſpect between land and moveable goods is, that an alien cannot naturally inherit land by will, unleſs ſome expreſs law has been made to enable the members of the community to tranſmit their land by will to aliens: whereas they can naturally ſo tranſmit their moveable goods, unleſs ſome expreſs law has been made to the contrary.

CHAP. VII.

Of derivative Acquiſitions by the Act of the Law.

I. *Grotius ſuppoſes two ſorts of derivative acquiſitions by the act of the law of nature.* II. *Derivative acquiſitions to ſatisfy a claim how made.* III. *The claim to ſucceed to the goods of an inteſtate depends upon conjecture.* IV. *Inteſtate ſucceſſions need ſome other ſupport beſides the law of nature.* V. *Inheritance does not ariſe from a general conſent of all mankind.* VI. *A regard to a mans perſonal duty is the principle, upon which inteſtate ſucceſſions were introduced.* VII. *The natural order of ſucceſſion according to this principle.* VIII. *Children why preferred to parents in inteſtate ſucceſſions.* IX. *The ſame principle governs the ſucceſſion, where an inteſtate leaves no children.* X. *Philo is miſtaken in his interpretation of the moſaic laws.* XI. *Order of ſucceſſion may be varyed by civil laws.* XII. *The ſucceſſion of children may be cut off by diſherſon.* XIII. *Uncertainty of birth hinders a child from ſucceeding to an inteſtate parent.* XIV. *Infants, ideots, and madmen naturally incapable of property.* XV. *Law of nations wrongly explaned by Grotius.* XVI. *Cuſtody of the law ſupplies the place of property.*

Grotius ſuppoſes two ſorts of derivative acquiſitions by the act of the law of nature.

I. WHEN the property of one man is transferred to another by the act of the law; this is done either by the law of nature, or by ſome poſitive law. Our ſubject does not require that we ſhould conſider any other transfers of this ſort beſides what are made by the law of nature.

Grotius

* Grotius maintains, that property is acquired derivatively by the law of nature in two inſtances, either to ſatisfy ſome claim of ſtrict juſtice, or to ſupply an heir to a perſon, who dies inteſtate. In the former of theſe inſtances, the acquiſition is indeed made by the law of nature; but in the latter of them we ſhall find, that it is not made effectually without the aid of inſtituted laws.

II. If any perſon has injured us, by taking from us what is our own, or by witholding from us what in ſtrict juſtice is due to us; the law of nature not only allows us to make repriſals by ſeizing upon ſo much of his goods, as is equivalent to what we have loſt, where we cannot recover the very thing itſelf; but it gives us property likewiſe in the goods ſo taken. For the law of nature cannot be ſuppoſed to hinder us from proſecuting our juſt claims, or from endeavouring to recover what, by the ſame law, is due to us. But we have a claim upon him, who has thus taken, or thus witholds, our property from us, to the value of the thing detained. If therefore we cannot come at the thing itſelf, as we have naturally a claim to an equivalent, the law of nature will allow us it out of his goods. Now the bare poſſeſſion, of what may in itſelf be of equal value with the thing loſt, is not an equivalent to the injured party; becauſe whatever may be the value of the goods ſo taken conſidered in itſelf, yet the bare poſſeſſion of them cannot make amends for the loſs of property. The claim therefore cannot be ſatisfyed, unleſs the law of nature, beſides allowing us to take poſſeſſion of goods, which are worth as much as what we have loſt, makes over to us likewiſe the property in ſuch goods.

Derivative acquiſitions to ſatisfy a claim how made.

* Grot. L. II. C. VII. § II.

The claim to ſucceed to the goods of an inteſtate depends upon conjecture.

III. The property, which any perſon has in his goods, naturally ceaſes at his death; and the goods, having no owner, revert to the common ſtock; if he has not diſpoſed of them by will, that is, if he has not in his life-time made an eventual alienation of them or transferred the property, which he had in them, to ſome other perſon, whoſe claim takes place immediately upon the event of his death. [y] When therefore a perſon dies inteſtate, that is, without having made any will at all, or at leaſt any that appears; whatever claim his relations, or any one elſe, may have to his goods, either moveable or immoveable, it can have no other foundation in nature, but a ſuppoſition or conjecture, that he had diſpoſed of them in his own mind, that he had deſigned to make them over to ſuch claimant, though this deſign was never declared.

In ſupport of this conjecture it may be urged; that, when a man foreſees the neceſſity of dying, and of being by this means deprived of all benefit or enjoyment of his goods, in his own perſon, it is not likely that he would loſe this opportunity of doing a kindneſs to ſuch other perſons, as he had a regard for, but would ſuffer his goods to revert to the common ſtock, or to become the property of any one, who ſhould firſt ſeize upon them, after his death. The conſequence from this conjecture, ſuppoſing it to be well-grounded, would be; that every man does in his own mind appoint a ſucceſſor to his property; that he intends to convey his goods, when he is prevented by death from enjoying them any longer, to ſome one or more perſons, whoſe welfare he has at heart, and to whom he is deſirous of ſhewing all proper inſtances of kindneſs and regard.

[y] Grot. ibid. § III.

IV. How-

IV. However, if we ſuppoſe this conjecture to be ever ſo well-grounded, yet thoſe perſons, who claim to inherit an inteſtates goods, muſt have ſome other law to ſupport their claim beſides the law of nature. The foundation of their claim is laid in a ſuppoſed intention of the inteſtate perſon, which he never declared. But according to the law of nature, [z] as has in another caſe been obſerved already, no effect can be produced by a mere inward deſign: the outward declaration, by which the deſign is notifyed, is as neceſſary to make any transfer of goods valid, as the deſign or intention of transferring them. An intention, which does not appear, can no more fall under the notice of mankind, and is therefore no more regarded by the law of nature, than an intention, which does not exiſt.

Inteſtate ſucceſſions need ſome other ſupport beſides the law of nature.

[a] Even where a will has been made, if there is no acceptance on the part of the heir, before the teſtators death, it does not produce its effect without the aid of poſitive laws. Much leſs therefore can any natural effect be obtained by a mere conjecture about the deſign of the deceaſed; where, as the intention of the anceſtor never was declared, it is impoſſible to ſuppoſe, that the heir had ever accepted. When a man has made a will, his heir, if he knows of it, may be ready upon the ſpot, and though he has not accepted beforehand, may accept immediately upon the teſtators death. But when a man dies inteſtate, it will commonly be uncertain for ſome time, whether a concealed will may not appear, which no one knew of: and during this interval, if no poſitive law takes the goods into its cuſtody, any perſon may ſeize upon them, and by ſuch occupancy may gain property in them; ſince

[z] See Chap. VI. § II. [a] See Chap. VI. § V.

during that interval, they have no owner. Nay the conjecture itſelf, upon which the whole ſuppoſed claim to inherit the goods of an inteſtate perſon depends, is too precarious to be the foundation of any right, if there was no other objection to it. We may ſay on the one hand, that a man could ſcarce be ſuppoſed willing to have his goods become common to all mankind, or paſs into the hands of a ſtranger, when he has an opportunity to diſpoſe of them for the benefit of thoſe, whom he loved. But then we may ſay, on the other hand, with equal probability, that his neglecting to diſpoſe of his goods amongſt his relations or friends, when he had it in his power, is a ſign, that he did not care, whether they were ſo diſpoſed of or not.

Since then the claim, which any perſon may be ſuppoſed to have to the goods of one, who dies inteſtate, depends upon a very uncertain conjecture; ſince this conjecture is ſuch an one as, for want of having been declared, the law of nature takes no notice of; and ſince, even if the law of nature ſhould take notice of it, yet for want of acceptance the goods might be ſeized upon by ſome other perſon, before this law could convey the property in them to the relations of the inteſtate; recourſe muſt be had to ſome other law, in order to make out the claim of his relations to inherit his goods.

It may perhaps be imagined, that a mans obligation to maintain his children extends itſelf to his goods, ſo as to give them a natural right to ſuch goods after the death of their parent, though he dies inteſtate. But it is plane, that the general claim to inherit in inteſtate ſucceſſions cannot depend upon this principle. If this

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as the foundation, upon which the claim of inheri-
nce depends, ſuch claim could extend no farther than
his children: his brothers or ſiſters, his uncles or
nts, or any other of his relations in what degree ſo-
ver, could have no place in the inteſtate ſucceſſion.
ut ſince, where a man dies without children, the claim
f inheritance is, in uſe and practice, extended to his
her relations; we may be ſure that this claim is ſup-
orted upon ſome other principle, and not merely upon
e duty, which a parent owes to his children. We
ay go one ſtep farther. The claim of the children
emſelves, where there are any, to inherit the goods
f their inteſtate parent, cannot depend ſolely upon the
uty of the parent to maintain them. Their claim
eaches, at leaſt in uſe and practice it is ſuppoſed to
each, to all his goods: whereas a claim founded in the
arents obligation to maintain them can naturally reach
o ſo much only of his goods, as may be neceſſary for
heir maintenance. If we examine this obligation of
he parent ſtill more cloſely, we may perhaps find,
hat it is not only inſufficient to give the children a
laim to all his goods, but even to any part of them.
As the parents obligation ariſes from a perſonal act,
whereby he became the cauſe of the childrens exiſtence,
ſo it reſts upon the parents perſon, and does not directly
affect his goods. A parent is obliged to maintain his
children; but he is not obliged to apply this or that
particular part of his ſubſtance to this purpoſe; nor
does he hold any of his goods upon condition, that he
will maintain them. He has an abſolute right in his
goods, and may ſell them or give them away; and
when he has ſold them, he may ſquander away the
money; nay at his death he may leave them from his

children

children by will. If he has ſtripped himſelf of his goo
in his life-time, or if, as may be the caſe, he had or
ginally no goods; the obligation to maintain h
children would ſtill be the ſame. It would not i
deed operate in the ſame manner; becauſe, whilſt w
ſuppoſe him to have goods, this obligation will affe
them indirectly; thoſe goods are then the readie
means, which he can make uſe of for the diſcharg
of his perſonal duty: but after he has thoſe mea
no longer in his power, he muſt ſtill diſcharge th
duty, as well as he can, by his labour, or by ſom
other means. But if the obligation of the parent t
maintain his children ariſes from his perſonal act; i
the right, which he has to his goods, is not the le
abſolute for his having children; and laſtly, if this obli
gation is the ſame, whether he has any goods or not
we may reaſonably conclude, that the claim of th
children to maintenance is upon the perſon of the pa
rent, and not upon his goods: and the conſequence
will be, that ſince they have no direct claim upon hi
goods, even during his life-time, their claim of main
tenance can give them no right to his goods, afte
his death.

It is indeed very evident, that a parent ought to do
the beſt that he can, for the welfare of his children;
and conſequently, that he does not do his duty, if he
ſuffers them, through any act or any neglect of his, to
loſe ſuch goods, as he had in his diſpoſal, and as he
might have ſecured to them after his death. But this
duty is of the imperfect ſort; the children have no
ſtrict right to the goods; and what is done contrary
to this duty and to their imperfect right will only be
wrong and not void. However, when a parent dies
poſſeſſed

poſſeſſed of goods, and without any juſt reaſon gives them away from his children, or cauſeleſsly disinherits them; civil laws do well to interpoſe, and ſet that will aſide: not becauſe the children had naturally a ſtrict right to inherit; for if they had, the will would be void of itſelf, without the interpoſition of any poſitive law; but the law, having authority over the perſon of the parent, does well to take care, that he ſhall in all reſpects diſcharge his duty, or to diſcharge it for him, where he has neglected it.

Inheritance does not ariſe from the general conſent of all mankind.

V. We have already ſeen, that the law of nature does not convey an inteſtates goods to any particular perſon, but leaves them in common, and ſubjects them to the claim of the firſt occupant; or that inheritance in inteſtate ſucceſſion is not naturally incidental to property. [b] But it may ſtill be queſtioned, whether inheritance has not been introduced and eſtabliſhed by ſuch a general conſent of all mankind, as that which introduced and eſtabliſhed property itſelf. In order to form a true judgement upon this queſtion, it will by no means be ſufficient to conſider merely the claim, which the heir has to the goods of his anceſtor, where both of them are members of the ſame community: becauſe, though ſuch heir, in all civilized nations, ſhould be found regularly to claim the goods of ſuch inteſtate anceſtor; yet it will be impoſſible to conclude from thence, that inheritance is eſtabliſhed by any univerſal law ariſing from a general conſent of all mankind. Each nation may have introduced inheritance amongſt themſelves, by their own particular conſent, though all nations, as one great collective body of individuals, have not introduced ſuch a claim amongſt one another, by a general conſent. To determine whether a claim

[b] Grot. ibid.

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of inheritance, though ſuch claim prevails in all nations, was the effect of a general conſent of all mankind, as one collective body, or of a particular conſent of each nation for itſelf; we muſt conſider how this claim operates, or whether there is any ſuch claim at all, when the two parties, the claimant and the anceſtor, are members of different communities. For certainly a claim of inheritance will hold univerſally, and operate uniformly; as well where theſe two parties are members of different communities, as where they are members of the ſame community; if it was introduced by the general conſent of all mankind, eſtabliſhing an univerſal law for all, and not by the particular conſent or appointment of each nation eſtabliſhing laws for itſelf.

The method of introducing general property in land, by occupancy in the groſs, will naturally prevent a ſtranger, that is, a perſon who is no member of the community, in which ſuch property is veſted, from inheriting by will; and much more will it prevent him from inheriting by right of inteſtate ſucceſſion. And where there is ſuch a natural bar, the conſent of mankind muſt be expreſs, or at leaſt the general uſe and practice of mankind muſt be very clear and uniform, before we can have any reaſon to conclude ſuch bar to have been removed. But if on the contrary we find, as upon enquiry we ſhould find, that in many, or rather in moſt, nations aliens or ſtrangers are not allowed to inherit land; the concluſion muſt be, that inheritance, of land at leaſt, is the effect of civil laws, and not of any poſitive law eſtabliſhed by univerſal conſent.

The property of individuals in moveable goods, as has been already obſerved, is more unlimited in reſpect of

f the diſpoſal of it, than their property in land. But ven ſuch goods, in reſpect of inheritance, are acciden- ally ſubjected to the community, in whoſe territories, hat is, upon whoſe land, they are found: the claimants an by this accident be hindered from fetching them way, unleſs upon ſuch terms, as the community has ſtabliſhed. Now if all perſons, who claim in an in- eſtate ſucceſſion, were to take ſuch goods as theſe, ccording to the ſame rules, in the ſame order, and nder the ſame limitations, in whatever territories theſe goods are found, whether within the territories, to which they themſelves belong, or in any other what- ſoever; ſuch an uniform claim might lead one to ſuſ- pect, that it had been introduced and eſtabliſhed by the common conſent of all mankind. But if, as the fact is, the rules, the order, and the limitations of ſuc- ceſſion to moveable goods, are determined by the civil laws of the community, within whoſe territories ſuch goods are found; and the claimant muſt take them in ſuch manner, as thoſe laws appoint, which laws and which manner are different in different countries; the obvious concluſion from hence is, that the claim of inheritance, being under the regulations of the civil law of each community, is not the effect of univer- ſal agreement, but of civil law only. Diſtinct com- munities, as having a general property in the land of their reſpective territories, ſeem to have agreed in this only, to take the advantage, which ſuch general property gives them, of excluding all from the claim of inheritance, unleſs they are willing to derive this claim from the laws of the community, and to enjoy the benefit of it as an effect of thoſe laws.

VI. As

In the introduction of inteſtate ſucceſſions a regard is had to a mans perſonal duty.

VI. As far as a man has a right to diſpoſe of his goods by will, he has an opportunity of doing good to others, without any inconvenience to himſelf: and ſince it is every perſons duty to do all the good he can; whoever does not take care at his death to give away what he has in his power, and can no longer enjoy himſelf, does not diſcharge his duty, ſo well as he ought. [z] If the law in introducing and eſtabliſhing inteſtate ſucceſſion proceeds upon the principle of doing a mans duty for him, where he has neglected it, of taking care to do that good for him, which he might have done himſelf, but has not done; we may trace out the perſons, who, in ſucceſſions eſtabliſhed upon this principle, will naturally inherit an inteſtates goods, and may point out the order, in which the claims of thoſe perſons will take place. Though the right of inheriting is introduced and eſtabliſhed by poſitive inſtitution, yet this inſtitution, like all others, will have a natural operation: and if we know the principle, upon which the inſtitution proceeded, we may from thence be enabled to judge what its natural operation will be.

A mans children ſtand firſt in the ſucceſſion.

VII. If the law introduced inteſtate inheritance merely with a view to the diſcharging a mans duty for him, where he had neglected to diſcharge it himſelf; the perſons, to whom this principle will direct us, in the diſpoſition of an inteſtates goods, are they, to whom he ought to have been kind. And the order in which ſuch perſons are to claim, will be determined, by the different degrees of kindneſs, which the inteſtate owed them.

[z] Grotius ibid.

The

[a]The firſt duty of kindneſs, which a man owes, is his children: he owes them the duty not only of maintaining them, but likewiſe of doing his beſt endeavours towards putting them into ſuch a condition, as may make their life eaſy and comfortable to them. They are the principal objects of his regard, or have of all other perſons the higheſt reaſon to expect his favour and bounty. Indeed, as he was the immediate cauſe of their coming into the world, it can ſcarce be looked upon as a matter of favour and bounty in him, to make them as happy as he can, whilſt they continue in it: he might rather very juſtly be charged with cruelty, if he was to do otherwiſe. This then being the principal inſtance of kindneſs, that every perſon, who has children, is obliged to; their claim to inherit his goods, upon the principle already laid down, will ſtand firſt, if he dies inteſtate.

[b]What we ſay of children, in the firſt degree of deſcent, may likewiſe be applyed to thoſe of the ſecond or third degree, that is, to a mans grandchildren, or great-grandchildren. Where the immediate parent of ſuch deſcendants is dead, and cannot inherit the goods of the grandfather or great-grandfather; the children, upon their remote parents dying inteſtate, inherit his goods; not only becauſe they ſtand in the place of their father, who would have inherited, if he had been alive; but becauſe it is the duty of the remote parent, as the remote cauſe of their exiſtence, to ſhew them all the kindneſs in his power.

VIII. [c]But ſuppoſe it ſhould happen, as it ſometimes does, that a perſon, who dies inteſtate, ſhould leave children, and that his parents likewiſe ſhould ſurvive him. Children why preferred to parents in inteſtate ſucceſſions.

[a] Grot. ibid. § IV. [b] Grot. ibid. § V. [c] Grot. ibid. § V.

him. As he owed a duty to his children, ſo he owe
duty to his parents: his gratitude for the kindne
which he received from them in their bringing hi
up, would oblige him to make ſome return of kindn
to them: it would in particular oblige him to provi
for them, as well as he could; if by age, or infirmit
or any other accident, they were rendered incapable
providing for themſelves. But then it is to be obſerve
that there is a natural reaſon, why parents ſhould
left out in an inteſtate ſucceſſion, at leaſt where th
eſtate is of antient inheritance. Such eſtates may com
to a man from ſome remoter relation by will; bu
the uſual courſe of them is, that they come to hi
from his parents. If therefore the rule for diſpoſing
them, where a man dies inteſtate, will be moſt natura
when it is moſt agreeable to the uſual courſe of ſuc
eſtates; ſince the general preſumption is, that the
came from his parents; the conſequence will be, tha
in a general rule for diſpoſing of them, as his parent
cannot be ſuppoſed to be in exiſtence, ſo no regard ca
be had to them. This rule may, by a reaſon taken
from the common courſe of nature, be extended ſo fa
as to take no notice at all of a mans parents in an
inteſtate ſucceſſion, where he leaves children. In th
common courſe of nature a mans parents, eſpecially
if he has lived long enough to have children of hi
own, do not uſually ſurvive him. If therefore hi
parents are entirely left out of an inteſtate ſucceſſion,
where he leaves children, it may be upon a general
preſumption, that he has then no parents in
being.

IX.

IX. [4] When an inteſtate perſon leaves no children; we are, in the diſpoſition of his goods, to conſider, whether they came to him by inheritance, or were of his own acquiſition. In either caſe a regard to his duty, conſidered as the principle, upon which the claim of inheritance was introduced, is to govern the ſucceſſion and to point out who ſhall be his heir. Such goods, as came to him from his anceſtors, laid him under an obligation of gratitude to them, from whom they came. If they deſcended from his father, the return of gratitude is due to him; if from his mother, it is due to her. And yet, though the duty, which governs the ſucceſſion, immediately reſpects his parents; ſome reaſons, already aſſigned will ſerve to ſhews us, why they ſhould be excluded from inheriting in their own perſons; if the inheritance is ordered by ſuch general rules as the courſe of nature would ſuggeſt to us. There is a natural preſumption, that a mans parents do not ſurvive him; and though ſuch eſtates, as we are now ſpeaking of, might poſſibly have come to him by will from ſome other anceſtor, and not from his immediate parents, yet the more uſual deſcent, in eſtates of antient inheritance, is from the parents themſelves. And ſince ſuch general rules, as are to govern theſe ſucceſſions, are to be taken from what is commonly the caſe; it follows that the parents of the inteſtate perſons are very reaſonably left out of the ſucceſſion, where the eſtate to be diſpoſed of is antient inheritance; upon account of the general preſumption, that ſuch eſtate came from the parents, and conſequently that his parents do not ſurvive him. As it is preſumed therefore not to be in his power to

The ſame principle governs the ſucceſſion where an inteſtate leaves no children.

[4] Grot. ibid. § IX.

pay the debt of gratitude to them in their own perſons, he can only pay it to their repreſentatives, that is, to thoſe, whom his parents, if they had been living, would have valued in the next place to themſelves. Theſe repreſentatives are the children of his parents, or his own brothers and ſiſters. The duty of gratitude therefore, which he owed to his parents for the eſtate of antient inheritance, received from them, will point out his brothers and ſiſters to be his heirs.

But ſuppoſe, that no brothers or ſiſters ſurvive him, and conſequently that it is not in his power to make a return to his parents in the perſons of their repreſentatives; we muſt then go another ſtep backwards: the gratitude, which he owed to his anceſtors, for the inheritance, deſcended from them, would lead him to his remoter parents, to his grandfathers or grandmothers. However as there is more reaſon to ſuppoſe them to be dead than his immediate parents, he could only ſhew his gratitude to theſe remoter parents in the perſons of their repreſentatives, who are his uncles or his aunts.

If there are no ſuch repreſentatives to take, in an inteſtate ſucceſſion, the obligation of gratitude ceaſes; and eſtates of antient inheritance are diſpoſed of in the ſame manner with eſtates of a mans own acquiſition. And we are next to conſider in what manner the principle of doing a mans duty for him will lead the the law to diſpoſe of ſuch eſtates as theſe, when he dies without children.

[c] What a man has acquired himſelf is not chargeable with any debt of gratitude, as it did not deſcend to

[c] Grot. ibid. § X.

him

him by the favour of any one. So that in theſe circumſtances he has no other duty to regard, but that of kindneſs or good will in general. Now the ties of friendſhip are often much cloſer in a mans own opinion, than thoſe of blood: we have often a ſtronger inclination to be kind to our friend, than to our relations. But as the connections of friendſhip are arbitrary and accidental, whilſt thoſe of blood are natural and uniform; the former cannot be reduced to the ſame rule or come under the ſame general notice, that the latter do. Upon this account, whatever arbitrary or accidental affections a man, whilſt he was alive, may have had for his friend, the moſt natural preſumption is, that he loved his relations better than any one elſe, and that he ought to have ſhewn his kindneſs and good-will to thoſe in the firſt place, who were the neareſt to him by blood. Theſe therefore, upon the principle already laid down, have the firſt claim to inherit what eſtate he has acquired himſelf.

Philo is miſtaken in his interpretation of the Moſaic law.

X. The law of Moſes ſays, [f] "Thou ſhalt ſpeak unto the children of Iſrael, ſaying, If a man die, and have no ſon, then ye ſhall cauſe his inheritance to paſs unto his daughter: and if he have no daughter, then ye ſhall give his inheritance unto his brethren: and if he have no brethren, then ye ſhall give his inheritance unto his fathers brethren: and if his father have no brethren, then ye ſhall give his inheritance unto his kinſman, that is next to him of his family."

Philo maintains, that this law of inteſtate ſucceſſion does not exclude the inteſtates father: [g] "for it would be ſenſeleſs to imagine, that the uncle ſhould be allowed to ſucceed the brothers ſon, as a near kinſman to his

[f] Num. XXVII. 8, 9. &c. [g] De vit. Mos. III. pag. 689.

father, and yet the father himſelf be denyed the ſame privilege. But ſince, as this writer goes on, the law of nature appoints, that children ſhould be heirs to their parents, and not parents to their children, Moſes paſſed this caſe over in ſilence, as ominous, and unlucky, and contrary to all pious wiſhes and deſires: leſt the father and mother ſhould ſeem to be gainers by the untimely death of their children, when they ought rather to be afflicted at it. Yet by allowing the inheritance to uncles, he indirectly admits the claim of the parents, in order both to preſerve decency, and to prevent the eſtate from going to a ſtranger."

He here allows, that in the order of nature parents are excluded from ſucceeding to their children: and this, one would think, is a ſufficient defence of the law of Moſes. He had however another point in view; he did not ſo much deſign to defend the law, as to explane it for the benefit of parents, and to ſhew, that the law, though it does not name them, allows them to ſucceed to the eſtates of their children. But any one, who reads the paſſage here cited from the law of Moſes, and compares it with what occurs in the ſame law upon the like ſubject, will find reaſon to think that the legiſlator has a particular view to eſtates of antient inheritance. And we have already ſeen, that, the general preſumption of ſuch eſtates coming to a man from his parents is a ſufficient ground for leaving the parents out of the ſucceſſion.

There is one diſpoſition made by this law of ſucceſſion, which differs from the general rules, that have been mentioned above; and that is the diſpoſition of a mans inheritance to his ſons, excluſive of his daughters; ſo that his daughters have no claim, unleſs he dies

without

without ſons. This part of the law was relative to the civil polity of the Jews: and the intent of it was to obtain a purpoſe, which the legiſlator had in view, of maintaining an equality of fortune amongſt the people, by keeping the ſame quantity of land, not only within the ſame tribe, but likewiſe within the ſame family. Now if the daughters had ſhared with the ſons; they by marrying into other families would have carryed a great part of the inheritance out of their own. The law therefore poſtpones their claim, and only gives them a claim in caſe there are no ſons. And even then, though it cannot obtain its firſt intention of keeping the inheritance within the ſame family, it takes care to keep it within the ſame tribe, by enjoyning, [h] that ſuch heireſſes ſhould marry to whom they think beſt, only to the family of the tribe of their father.

Order of ſucceſſion may be varyed by civil laws.

XI. Though the order of ſucceſſion, which we have been deſcribing, is called a natural one; yet it is not for that reaſon ſo fixed and ſettled, as to make it unnatural or unreaſonable for civil laws to call the relations of an inteſtate to inherit his goods, in a different order. If this is a natural order at all, it is only ſo upon theſe two ſuppoſitions; firſt, that civil laws have eſtabliſhed inteſtate inheritance; and ſecondly, that in ſuch eſtabliſhment they proceeded upon the ſole principle of taking care to diſcharge a mans duties of kindneſs for him, where he had neglected to diſcharge them himſelf. But civil laws have commonly ſome other principles in view, beſides this, ſuch as are relative either to the civil polity of the ſtate itſelf, or to the conditions, upon which the individuals hold their property.

[h] Num. XXXVI. 6.

So that, notwithſtanding the law may deſign in general to ſhew that kindneſs to an inteſtates relations, which he ought to have ſhewn them, by diſpoſing of his fortunes amongſt them; a regard to thoſe other principles may lead it to diſpenſe this kindneſs in a different order from what we have been deſcribing. We have juſt now taken notice of an inſtance of this ſort in the moſaic law, which though it calls a mans children to inherit in preference to all others, as they are the perſons, to whom he owed the chief regard; yet in view to the deſign of preſerving the ſame lands in the ſame tribe, and as much as might be in the ſame family, it poſtpones the claim of the daughters, and gives them no ſhare in the inheritance, where there are any ſons. Upon the whole, as it is an argument of a ſhallow inſight into matters of this ſort, to charge the civil law of any country with being arbitrary and unreaſonable, where in the order of inteſtate ſucceſſions they deviate from ſuch rules as would ariſe out of that natural affection, which every man is ſuppoſed to have for his relations, according to their nearneſs to him in blood; ſo on the other hand, no reaſons, that can be aſſigned for ſuch deviations, will be ſatisfactory, unleſs they are taken either from the particular civil conſtitution of the country, and the purpoſes, which ſuch a civil conſtitution has in view, or elſe from the conditions, upon which every individual, who is a member of the civil community, is ſuppoſed to receive and to hold his property.

The ſucceſſion of children may be cut off by diſheriſon.

XII. [i] If a man by any public or ſolemn act has diſinherited his children, in his life time; this act will naturally prevent their claim to his goods, where he dies inteſtate.

[i] Grot. ibid. § VII.

teſtate. For his declared intentions concerning his property are in effect his will or teſtament: ſo that a child, thus diſinherited, has no more claim to ſucceed to the eſtate of his parent, than he would have had, if ſuch parent had expreſsly excluded him by will. Such an act of the parent in his life-time, or ſuch a will made by him at his death, are contrary to the duty of a parent, if the child had not been guilty of any crime, which might deſerve ſuch uſage. But if the parent had a full right to diſpoſe of his goods, as he pleaſed; the act of diſheriſon, though it is contrary to his duty, will not be void, without the interpoſition of the civil law. It is however, as we have before obſerved, very reaſonable, that the civil law ſhould interpoſe in theſe caſes, and ſet aſide his will, or make void his act of diſheriſon, ſo as to diſpoſe of his eſtate in ſuch a manner, as he ought in duty to have diſpoſed of it himſelf.

Uncertainty of birth hinders a child from ſucceeding to an inteſtate parent.

XIII. [k] There is a ſecond exception againſt a childs ſucceeding to an inteſtate father; and that is, where proper evidence is wanting, that the perſon whoſe goods are in queſtion, was its father. Becauſe if there is not ſufficient ground to preſume, that the child is his own, it does not appear to have been his duty to provide for ſuch child. Now the ground for preſuming the child to be his own is, that it was born in marriage. For ſince by marriage the wife is placed under the inſpection, and is in the cuſtody, of her huſband; it is reaſonable to ſuppoſe, that he has kept all other men from her, and conſequently that the children, which ſhe bears, are his own. Nor does it appear, that where the law has eſtabliſhed a right of inheritance,

[k] Grot. ibid. § VIII.

ſuch children could claim in virtue of their fathers acknowledging them by any public act, unleſs the ſame law had allowed of the validity of ſuch acknowledgment. For inſtance, where adoption is allowed of, a man might as well adopt ſuch children born out of marriage, as any other perſons; and then the effect of his having adopted them would be, that they might inherit as his children. But where adoption is an act unknown to the law, an eſtabliſhed right of inheritance extends to them only, to whom, in the eye of the law, the inteſtate owed a duty; and theſe are ſuch only as are known, by the legal evidence of a marriage with their mother, to have been his children.

Infants, ideots, and madmen naturally incapable of property.

XIV. Now we are ſpeaking of the claim, which children have, of ſucceeding to the eſtate of their inteſtate parent; it may be proper to enquire, how far ſuch children, if they are infants, and how far infants in general, are capable of making a derivative acquiſition of property. I ſay a derivative acquiſition; becauſe I ſuppoſe it to be evident, from what has been ſaid already, that they cannot poſſibly make an original acquiſition. And ſince the caſe of madmen and of ideots is nearly the ſame with that of infants, we may take this opportunity of conſidering how far any of them are capable of acquiring property derivatively. No derivative acquiſition, as has been ſhewn already, can be made without the intention, deſign, or conſent of the party, who makes it, and without ſome declaration or notification of ſuch intention, either by words or by actions. But ſince there can be no ſuch intention, and no ſuch notification, where there is no uſe of reaſon; it follows, that infants, who are not yet come to the uſe of reaſon, that ideots, who never will arrive at

it

t, and that madmen, who have loſt it, are naturally incapable of acquiring property.

There is indeed one queſtion relating to madmen, in which infants or ideots are not concerned. Infants cannot acquire property, whilſt their natural incapacity continues, and ideots can never acquire it, as long as they live: we cannot therefore ask, whether they are capable of keeping or holding property, after they have acquired it. But ſince men, who were once of ſound underſtanding and have paſſed their infancy, may loſe their ſenſes afterwards, and become mad; we may aſk whether they, by thus loſing the uſe of their reaſon, ceaſe to have property in thoſe goods, which they had before acquired. And certainly where the deſign of keeping property in goods ceaſes, where there is no intention of excluding others from the uſe or poſſeſſion of them, the right of property is at an end: an intention to keep up this claim is as neceſſary to maintain it, as an intention to acquire ſuch a claim is to begin it. But ſince this intention ceaſes with the uſe of reaſon; madmen by the law of nature are no more capable of keeping property, than they are of acquiring it.

Law of nations wrongly explaned by Grotius.

XV. [1] Grotius imagines, that infants, ideots, and madmen are made capable of accepting and of retaining property by the common conſent of mankind, which conſiders them as part of the human ſpecies; and by this fiction, that is, by conſidering them as part of the human ſpecies, they are looked upon to have ſo much reaſon, as will render them capable, like the reſt of the ſpecies, to accept and to hold property. But then he obſerves, that though human laws, ſuch

[1] Grot. L. II. C. III. § VI.

for

for inſtance as what he calls the law of nations derived from the common conſent of mankind, may ſuppoſe what is different from nature, yet they cannot ſuppoſe what is contrary to it. The right therefore of property in infants, or ideots, or madmen, as far as it depends upon ſuch a law, can extend only to the acquiſition and poſſeſſion of things, but not to the uſe of them, or to the power of alienating them. Now it does not appear to me, that a ſuppoſition of their capacity to uſe or to alienate their property is at all more contrary to nature, than a ſuppoſition of their capacity to take and to retain it. Reaſon is as neceſſary in one of theſe acts, as it is in the other: he, that has not the uſe of reaſon, cannot indeed alienate his property, but neither can he acquire property: and if it is contrary to nature to ſuppoſe him to have the uſe of reaſon for one purpoſe, it muſt be as contrary to nature to ſuppoſe him to have the uſe of it for the other purpoſe. Since therefore it is granted, that the common conſent of mankind cannot, without going contrary to nature, ſuppoſe infants, or ideots, or madmen, to have ſo much uſe of reaſon as to make them capable of uſing or of alienating their property, we may reaſonably conclude, that neither is it any common conſent proceeding upon this principle, which makes them capable of taking and holding it. Indeed an incapacity of uſing or of alienating is inconſiſtent with the notion of property, unleſs we ſuppoſe that property to be a limited one: becauſe full property in a thing implies a power of uſing it, and diſpoſing of it, in what manner we pleaſe. If therefore both by the law of nature, and by this ſuppoſed fiction of the law of nations, infants, and ideots, and madmen are incapable of uſing and of

alienating

ienating goods, they muſt be deemed equally inca-
able of having full property in them.

XVI. It is obvious to aſk here, what is meant, when we ſpeak of the eſtate or the goods of infants, r ideots, or madmen? If they have no property in ch eſtate or goods, why do we call them theirs? and nce, if they have not property in the things ſo called, hoſe things are either the property of no man, or, here inheritance has been eſtabliſhed, are the proper- of the next heir, who is under no incapacity; the ext queſtion will be, why may not any one ſeize up- n ſuch eſtate, as being become common; or however hy may not the next heir conſider it as his own, if here is any ſuch heir? Certainly this might be done, f no poſitive law interpoſed to hinder both the next eir in ſucceſſion from entering in his own right, and o hinder all other perſons from ſeizing upon ſuch hings, as would belong to an infant, or ideot, or mad- an, if they were capable of property. But then theſe aws do not interpoſe by a fiction, that infants or deots or madmen, as parts of the humane ſpecies are apable of acquiring and holding property: they in- erpoſe by taking thoſe things into their cuſtody, or y guarding them for the benefit of him, who would e the owner of them, if he was capable of property. And thus all other perſons are prevented from making ny acquiſition of them, not in virtue of any ſuppoſed excluſive right in him, but merely by the authority and prohibition of ſuch law.

Cuſtody of the law ſupplies the place of property.

In the mean time the things are called his, not be- cauſe they are ſo, but becauſe the effect of the law in reſpect of all other perſons is the ſame with the effect of an excluſive right in him. I ſay in reſpect of all

other

other perſons; for in reſpect of himſelf the effect
not the ſame: an excluſive right of property eithe
real or ſuppoſed would give him the power not onl
of keeping, but likewiſe of uſing or of alienating hi
goods; whereas the mere cuſtody of the law, thoug
it hinders others from ſeizing upon them, does no
produce any ſuch power in the perſon, for whom the
are kept.

When things are thus kept for the benefit of infants
they are in the cuſtody of the law, till thoſe infants ar
rive at the uſe of reaſon, and then their property be
gins. When they are kept in the ſame manner for th
benefit of madmen, the cuſtody is precarious and tem
porary: for ſince madmen are frequently known t
recover the uſe of their reaſon, and are therefore al
ways deemed capable of recovering it, their propert
can be in the guardianſhip of the law only till this even
happens; and ſince it is uncertain at what time it wil
happen, the cuſtody of their property is precarious. Bu
when things are kept for the benefit of ideots, th
cuſtody is perpetual, that is, it laſts as long as th
ideot lives: becauſe ideots are ſuch, as never had an
never can have the uſe of reaſon.

CHAP

CHAP. VIII.

Of Preſcription.

What Preſcription is, and on what founded. II. *Why long poſſeſſion is neceſſary to claim by preſcription.* III. *Why uninterrupted poſſeſſion is neceſſary.* IV. *Why honeſt poſſeſſion is neceſſary.* V. *Preſcription extends to incorporeal things.* VI. *Objection to the natural foundation of preſcription.* VII. *Some grounds to believe preſcription to have been eſtabliſhed by an univerſal conſent.* VIII. *What length of time gives an equitable claim by preſcription.* IX. *Preſcription holds againſt perſons unborn.*

What preſcription is, and on what founded.

PReſcription is a right to a thing acquired by long, honeſt, and uninterrupted poſſeſſion; though before ſuch poſſeſſion ſome other perſon and not the poſſeſſor was the owner of it.

[m] This right in the poſſeſſor is founded upon the preſumed derelict̃ion of the proprietor. It is not indeed agreeable to the law of nature, that any moral effect, ſuch for inſtance as the loſs or the acquiſition of a right, ſhould follow upon the bare intention of the mind: but when the intention either of parting with, or of acquiring a right is ſufficiently declared, it is natural, that ſuch an intention ſhould produce its effect.

Now our intentions may be made known either by words or acts. We may indeed falſify in our words, or we may diſſemble in our behaviour: it is poſſible, that we may ſay one thing, when we mean another,

[m] Grot. L. II. C. VI. §. I, II, III, IV, V.

or

or that we may behave in ſuch a manner as to deceive mankind, and make them believe our deſigns to be different from what they are. There is therefore no ſtrict and neceſſary connection between our intentions and the ſigns, whereby we teſtify them. It muſt however be allowed, that our acts may be as certain marks of our intention, as our words; which is all we need contend for. Thus we may releaſe a debtor, not only by a verbal declaration, but by delivering up or by cancelling his bond: and in like manner what we throw away is as planely relinquiſhed, as if we had declared our deſign to relinquiſh it in ſo many words.

The acts, by which we may notify our intentions, are either poſitive or negative; that is, our intentions may appear either from our actions or our omiſſions. [a]When any thing is transacted, in which a man is concerned, if he is preſent at the time, and does not contradict it; the preſumption from his ſilence is, that he conſents to it. If goods are ſhipwrecked, or cattle have ſtrayed, and the owner neither ſends out to look for them, nor endeavours by any means to recover them, the moſt obvious conſtruction of his neglect is, that he deſpares of finding them, and diſregards or gives up any claim, that he had to them. In like manner, if he ſuffers another to keep poſſeſſion of his goods, without laying claim to them, when he both knows where they are, and is at liberty to claim them, this neglect is fairly preſumed to be a mark of his intention to part with them: and when the owner has thus relinquiſhed them, they become the property of the poſſeſſor, as the firſt occupant of them.

[a] Num. XXX. 4. 11.

It

It is neceſſary however to remember that in this, and in all other inſtances, where a mans neglect to claim is deemed a mark of his intention to relinquiſh his goods, it is requiſite that his ſilence ſhould not ariſe either from ignorance or from fear. If he does not claim his goods, either becauſe he does not know what are his goods or who is in poſſeſſion of them, or becauſe he is under ſome reſtraint and is afraid to claim them; his ſilence in ſuch circumſtances can be no mark of his intention to part with them: ſuch ſilence plainly ariſes from another cauſe, and therefore neceſſarily requires another conſtruction.

Why long poſſeſſion neceſſary to claim by preſcription.

II. From what has been ſaid it will appear, that preſcription cannot proceed but upon long poſſeſſion. not becauſe length of time operates as an efficient cauſe to produce a right in the poſſeſſor; but becauſe it is neceſſary in order to make the owners ſilence a reaſonable ground to preſume, that he intends to relinquiſh his property. If his neglect is of ſhort continuance, it may be owing either to his ignorance or his fear: he might not know what things he had a right to, or he might not know who was in poſſeſſion of them; or if he knew both theſe particulars, yet ſtill he might be afraid to make his claim. But in the courſe of a long time, it is reaſonable to imagine, that he might have come to the knowledge both of his claims, and of the perſon who is in poſſeſſion of what belongs to him, and that he might likewiſe by ſome means or other he able to remove his fears, or at leaſt to find ſome opportunity of declaring his right without any danger. Length of time therefore determines his ſilence or neglect to be a mark of his intention to relinquiſh his right; as it affords a reaſonable

preſumption,

preſumption, that ſuch ſilence or neglect was not owing either to ignorance or to fear.

Why uninterrupted poſſeſſion neceſſary to claim by preſcription.

III. Uninterrupted poſſeſſion is planely neceſſary to give the poſſeſſor a right by preſcription; becauſe his right depends upon the preſumptive dereliction of the owner; and there can be no preſumption of his having relinquiſhed, where by any claim of his he has interrupted the poſſeſſion.

Why honeſt poſſeſſion neceſſary to claim by preſcription.

IV. It is to be farther obſerved, that preſcription cannot proceed without honeſt poſſeſſion. If the poſſeſſor came diſhoneſtly by the goods, though his poſſeſſion is ever ſo long or ever ſo quiet, he acquires no claim to them. We may ſeveral ways become honeſtly poſſeſſed of what belongs to another man without having any right to it, when we are firſt poſſeſſed of it. Suppoſe, for inſtance, that the thing has been given us by any one, who was not the true owner of it, though we thought he was; ſuppoſe we have purchaſed it of any one, who had obtained it by force or by fraud, without our knowing how he obtained it; or ſuppoſe we have found it, and have endeavoured without ſucceſs to find out the true owner; in any of theſe caſes our poſſeſſion is honeſt, though the thing poſſeſſed is not our own. Where poſſeſſion of a thing begins after ſuch a manner as this, without any diſhoneſty in the poſſeſſor, and has been continued for a conſiderable length of time without being interrupted, it will give him a right to the thing. But if his poſſeſſion was diſhoneſt in the firſt inſtance, he can acquire no ſuch right. All diſhoneſt poſſeſſion implies, that ſome fraud or ſome violence was made uſe of in obtaining it. Where fraud is made uſe of, the owner is certainly ignorant of ſomething, which

which he ought to know; and where violence is made uſe of, the owner is certainly in ſome fear. Now length of time affords only a preſumption, that the ignorance or fear of the owner are removed: and conſequently, ſince no preſumption can prevail againſt a certainty, no length of time can ſo far take away the ignorance or the fear of the owner, in the caſe of diſhoneſt poſſeſſion, as to render his ſilence a ſufficient ſign of his intention to quit his claim. As his ignorance or his fear were certain at firſt, the ſame ignorance or the ſame fear muſt be ſuppoſed to continue, till they are certainly removed. Length of time affords only a preſumption, that they are removed. Therefore length of time does not remove them ſufficiently. But ſince as long as his ſilence is underſtood to ariſe either from ignorance or from fear, it cannot reaſonably be looked upon as a ſign of his intention to relinquiſh his right, and upon that account the right of the poſſeſſor cannot take place; it follows, that no poſſeſſion, though for a great length of time and without interruption, can give a right by preſcription, if it began diſhoneſtly.

Preſcription extends to incorporeal things.

V. When we ſay, that things may be acquired by preſcription, we muſt be underſtood to mean, not only corporeal, but likewiſe incorporeal things. Juriſdiction or ſovereignty may be acquired in this manner, as well as land or moveable goods. Laws may be repealed; cuſtoms may be eſtabliſhed into laws; civil conſtitutions of government may be altered; ſubjects may enlarge their privileges; governors may extend their prerogative; not only by expreſs appointment or compact, but likewiſe by ſuch a tacit agreement as this of preſcription. But it is not neceſſary to

enter into this matter now; becauſe there will be a a more proper opportunity, when we come to explane the law of nature, as it reſpects civil ſocieties.

Objection to the natural foundation of preſcription.

VI. The principle, upon which the claim of preſcription is founded, according to the law of nature, as far as we have yet explaned it is only preſumption or conjecture. [o] The owner of the thing, which the preſent poſſeſſor claims, is preſumed to have quitted his right to it, merely becauſe he has been ſilent about it, and has neglected to claim it for a long time. Mankind indeed might by common conſent eſtabliſh ſuch a ſilence into a ſtanding mark of an intention to relinquiſh, in the ſame manner as, by a like common conſent, they have affixed a certain and determinate ſignification to words, which in themſelves, without ſuch conſent and eſtabliſhment, have no ſignification at all. But without an eſtabliſhment or conſent of this kind, the owners ſilence alone, though of ever ſo long a continuance, would be too precarious a mark of his intention to relinquiſh his right for any certain and uniform claim of the poſſeſſor to be founded upon it. Mankind, as far as we can learn what their inclination is by conſtant experience, are generally diſpoſed to keep what they have gotten, and not to relinquiſh it without good and ſufficient reaſons for ſo doing. Any neglect therefore to claim what is their own, if we would interpret it agreeably to the nature of mankind, as we learn from conſtant experience what that nature is, cannot well be looked upon as a mark of their intention to relinquiſh their right; unleſs ſome other good and ſufficient reaſons appear, why they ſhould relinquiſh it: their general temper and inclination will

[o] Grot. ibid. § VIII.

rather

rather lead us to ſuppoſe, that ſuch neglect or ſilence may have been owing to ignorance or fear.

To ſupport the right of preſcription upon natural principles, it is ſometimes explaned in a different manner. This right is ſaid not to take place, till a man has been in poſſeſſion of the thing claimed for time immemorial, and that as no other proprietor can then appear, beſides the preſent poſſeſſor, he alone is to be looked upon as the true proprietor: becauſe a claimant, who does not appear, and a claimant, who does not exiſt, are in a moral view the ſame thing. Now if by time immemorial is here meant, ſuch a length of time, that no memory can poſſibly go farther back; the poſſeſſor of the thing muſt, after ſuch time immemorial, be undoubtedly the proprietor of it: but then he cannot well be ſaid to have a right to it by preſcription; becauſe his right, upon this ſuppoſition, will not differ at all from a right by firſt occupancy. For certainly where there neither are nor can be any traces of any other owner, beſides himſelf; he muſt neceſſarily be looked upon as the firſt owner. But if by time immemorial any time leſs than this is meant; if there are any traces of a former owner, though ſuch former owner has not claimed for many years; it will be as difficult, upon this principle of poſſeſſion for time immemorial, to make out the poſſeſſors right to the thing ſo poſſeſſed, as upon any other, without having recourſe to ſome poſitive eſtabliſhment.

VII. The circumſtances of mankind after the introduction of property, and after poſſeſſion had been long loſt by the old proprietor, and had long continued in ſome other perſon, would make ſuch a claim as this of preſcription,

Some grounds to believe preſcription to have been eſtabliſhed by an univerſal law.

preſcription, generally beneficial. For without ſuch a claim, the difficulty of aſcertaining the right of either party would be the occaſion of endleſs diſputes and of great hardſhips. Diſputes ariſing, after poſſeſſion on one ſide had been many years uninterrupted, could not eaſily be decided with fairneſs and honeſty: because it would be difficult either for the ſucceſſor of the other claimant to clear up their title. And it would be a hardſhip to turn the poſſeſſor out of what he had quietly enjoyed, till it was in a manner grown to his patrimony; eſpecially ſince the former proprietor cannot in general be ſuppoſed to want it much, as he had been able to live ſo long without it, and to provide for himſelf by ſome other means. The uſefulneſs of a claim is indeed no proof, that ſuch claim has in fact been eſtabliſhed. To prove this we muſt have recourſe to the common opinion of mankind, as it appears in their conſtant practice. And ſince, when we look into their practice, we find, that not only ſuch perſons, as are members of the ſame civil ſociety, but thoſe likewiſe, who belong to different communities, plead preſcription againſt one another; nay ſince we find that when one nation has been long poſſeſſed of what did formerly belong to ſome other nation, the poſſeſſor maintains his right to the thing by a like plea; and that ſuch a plea, if it can be well ſupported, is generally allowed to be a good one; we have reaſon to conclude, that the claim of preſcription has been introduced and eſtabliſhed by a like common conſent with that, which introduced and eſtabliſhed the claim of property. But becauſe preſcription is a ſort of limitation or exception in the right of property; it is neceſſary to look a little farther than the bare eſtabliſhment

of

of ſuch a right in order to ſee how we can reconcile it with the claim of property. And it is in this part of the queſtion, that we have recourſe to the principles already explained, to the preſumption, that he, who is ſilent for any great length of time and does not claim his right, is diſpoſed to relinquiſh it.

What length of time gives an equitable claim by preſcription.

VIII. It may perhaps, without ſome expreſs appointment, be difficult to determine for what length of time a perſon muſt be in poſſeſſion of a thing, to give him a claim to it by preſcription. The foundation of this claim, as we have already explained it, will ſhew us, that the time muſt be long enough for preſuming, the former owner of the thing was not hindered from putting in his claim either by ignorance or by fear, but muſt have had frequent opportunities of knowing both what his right is, and who was in poſſeſſion of it, and frequent opportunities likewiſe of releaſing himſelf from any reſtraints, which might have forced him againſt his will to be ſilent as to his claim. Poſſeſſion however for time immemorial, if the meaning of the words is rightly explaned, ſeems to be the moſt equitable time of poſſeſſion for acquiring a preſcriptive right.

The moſt obvious meaning of time immemorial is a time of ſuch duration, that the memory of no man living can of itſelf, when unaſſiſted by any external evidences, go back beyond it. A poſſeſſion of no longer continuance than this would give a right by preſcription too ſoon: becauſe by the help of written evidences, the memory of man is aſſiſted to go back into ſuch periods of time, as have been long paſt; and ſuch evidences will frequently ſhew where the poſſeſſion of the former owner ceaſed, and by what means the claimant by preſcription got poſſeſſion at

firſt and continued it afterwards. But then on the other hand, if by poſſeſſion for time immemorial we mean nothing leſs than ſo long a poſſeſſion, that not only the unaſſiſted memory of perſons now living cannot go farther backwards, but likewiſe, that no written evidences, no memory aſſiſted by the ordinary method of recording facts, which are paſt, can make out any traces of any other proprietor, beſides the preſent poſſeſſor; the claim of preſcription would then be uſeleſs, and would not differ at all from the claim of firſt occupancy. For where would be the uſe of it, if there was no other claimant beſides the preſent poſſeſſor? and what other claimant could there be, if there were no traces at all to be found of any right in any other perſon beſides himſelf? He would upon this ſuppoſition have an indiſputable title to the thing, which he poſſeſſes, as the firſt occupant of it; becauſe he appears to be the only owner, that it ever had.

There is however a middle ſenſe of time immemorial. If we underſtand it to mean ſo long a time, that though a former owner may be able to make out ſome ſort of title, yet he cannot either by the memory of any perſon now living, or by any record of paſt facts, make out a clear and undoubted title to the thing in queſtion; poſſeſſion, for ſuch a length of time as this, may fairly determine the thing to belong to the preſent poſſeſſor. A preſcription gained by poſſeſſion for a time thus limited, will be different, as it ought to be, from a right of firſt occupancy; and it will likewiſe be of benefit to mankind by deciding controverſies, not eaſily to be decided otherwiſe, without taking place ſo ſoon, as to be in danger of barring the claim of the true owner. Its uſe conſiſts

in

barring a doubtful right; and its equity is preſerved by a proper regard to all ſuch rights as can be made out by the memory of man, when aſſiſted by written evidences.

IX. What we claim by preſcription, or in conſequence of our having been poſſeſſed of it without interruption for time immemorial, muſt commonly have been in poſſeſſion either of ourſelves or our anceſtors for a longer time, than the extent of any one perſons life. So that preſcription muſt moſt frequently be pleaded, not ſo much againſt the former owner, as againſt his heirs. Now for great part of the time, whilſt this poſſeſſion laſted, thoſe heirs were not in being: they were not born, when our own poſſeſſion began, and poſſibly were not born, when our anceſtors poſſeſſion had continued long enough to give a preſcriptive right. [p] Shall we allow therefore, that the claim of the anceſtor, which was ſet aſide by our long poſſeſſion, will revive again in the perſon of the heir? If we allow this, preſcription will be of little uſe: it will only ſerve to lay a diſpute aſleep for a while, but will ſuffer it to revive hereafter, when the queſtion concerning the reſpective claims of the former owner and of the preſent poſſeſſor will have become more intricate, in proportion as we are farther removed from the original evidence, by which that diſpute might have been ſettled. Shall we therefore, on the other hand, affirm, that a preſcriptive right will bar the claim not only of him, who firſt loſt poſſeſſion, but of them likewiſe, who are deſcended from him, and were not born at the time, when ſuch preſcription was going on and began to take place?

Preſcription holds againſt perſons unborn.

[p] Grot. ibid. § IX.

Before we affirm this, we ſhould conſider by whoſe ſilence or neglect the right of property is loſt. If it is loſt by the ſilence of the heirs, who were unborn, a preſcriptive right would have no foundation in reaſon, that might reconcile it with the notion of property. It is abſurd to conſtrue the ſilence of thoſe, who were unborn, as a mark of their intention to relinquiſh their rights: becauſe their ſilence will not only bear, but requires another conſtruction; they were therefore ſilent and did not claim, becauſe they were not born, and could not claim. But if we maintain, that they, who were unborn, loſt their right, not by their own ſilence or neglect, but by the ſilence or neglect of their anceſtors; preſcription againſt them ſeems to be founded in injuſtice; it is an injury to deprive them of what belongs to them, for the neglect of their anceſtors, a neglect, in which they were no way concerned.

What ſhall we ſay therefore? Shall we take away the benefit of preſcription by allowing, that it does not hold good againſt the poſterity of the former owner? or ſhall we, on the other hand, maintain, that it does hold good againſt his poſterity, as well as againſt himſelf, and ſo either make the claim abſurd, by ſaying, that the ſilence of his poſterity, when they could not ſpeak, is a mark of their intention to relinquiſh their right; or elſe ſhall we make it unjuſt by ſaying, that they forfeit their right by the neglect of their anceſtor? The truth is, that preſcription holds good, not only againſt the anceſtor, but againſt his poſterity; not from their neglect, who were unborn, but from the neglect of thoſe, who went before them. And by taking this part, we have only the juſtice of ſuch a claim by preſcription to defend. It will be no very difficult

difficult matter to defend this part of the alternative, where inheritance has never been eſtabliſhed: becauſe the deſcendants of a man can have no injury done them in being kept out from inheriting what they had no right to inherit. But ſuppoſe a general right of inheritance to have been eſtabliſhed; yet ſtill the claim of preſcription will ſtand clear of injuſtice. No injury can be done to a perſon, where no right is taken from him. But the poſterity of a man, who loſes his claim by the preſcription of another, are not deprived of any right. Before they were born, they had no right at all: for as things, which are not in exiſtence, have no natural qualities, ſo perſons, who are not in exiſtence, have no moral qualities; and amongſt other moral qualities, they have no rights. If then the thing in queſtion was loſt by their anceſtor, before they were born, no right is taken from them by their being barred from claiming what he had ſo loſt: becauſe they have no right to inherit any thing from him, which is not his own at the time of his death; and whatever he has loſt by long neglect, and another has acquired by long poſſeſſion, has ceaſed to be his own. No injury was done to them, whilſt the claim was acquiring; becauſe then they had no right in the thing, if they were not in exiſtence, and loſt that right by their own ſilence, if they were in exiſtence. And no injury is done to them by the poſſeſſor, after the claim is acquired, if he ſtill keeps the thing; becauſe it then belongs to him, and not to them; ſince they can have no pretence to inherit, from their anceſtor, what ſuch anceſtor himſelf had no right to at the time of his death.

CHAP.

CHAP. IX.

Of the Obligations ariſing from Property.

I. *Property of one man obliges others not to hinder him in enjoying what is his own.* II. *The right of property produces an obligation to reſtitution.* III. *The natural fruits or advantages of anothers property are to be reſtored.* IV. *Honeſt poſſeſſor not obliged to damage himſelf by reſtitution.* V. *No obligation to reſtitution where the thing has periſhed.* VI. *Obligation to reſtitution does not extend to all advantages made by the poſſeſſor.* VII. *No obligation to reſtitution of fruits neglected.* VIII. *Or where a thing given is given away again.* IX. *Or to reſtore the overplus of price where a thing bought is ſold again.* X. *Reſtitution to be made without reimburſement.* XI. *Goods to be reſtored and not returned to the ſeller.*

Property of one man obliges others not to hinder him in enjoying what is his own.

I. THE firſt and moſt obvious obligation, that we are under, towards any perſon upon account of his property in a thing either moveable or immoveable, is to ſuffer him quietly to enjoy it, and to diſpoſe of it, in what manner he pleaſes, without attempting by ſome force or by fraud, either to take it from him, or in any reſpect to make it worſe. This obligation planely ariſes out of the notion of property: for his right to exclude us from meddling at all with a thing would have no effect, or would be in reality no right; if we, notwithſtanding ſuch right, were at liberty to take the thing away from him,

im, or to hinder him in the uſe and enjoyment of , or by any means to impare and waſte it.

The right of property produces an obligation to reſtitution.

II. [g] As the right of property, which any perſon has n a thing, obliges us not to take that thing from him iſhoneſtly; ſo it obliges us to reſtore it to him, or ot to keep it from him, when we have, even by any oneſt means, gotten it in our poſſeſſion. When with- ut any knowledge of the truth or any bad deſign on ur part, a thing is given us, which belonged to ſome ther perſon and not to the giver; when we purchaſe what ſome one elſe, and not the ſeller, had a right in; when we find a thing, the owner of which is not known, at the time of finding it; in ſuch caſes as thoſe our poſſeſſion of the thing is honeſt; till we have found out the proprietor: but as ſoon as we have found him, we are obliged, in virtue of his property, to reſtore the thing to him. For if we knowingly and deſignedly keep him out of what he has a right to, we do him the ſame harm, and conſequently are guilty of the ſame injuſtice as if we had taken it from him.

The natural fruits or advantages of anothers property are to be reſtored.

III. From this obligation to reſtore any perſons pro- perty, when it is in our hands, another obligation is derived, an obligation to reſtore the natural fruits, pro- duce or advantages, which have ariſen from it, whilſt we were in poſſeſſion of it: becauſe the natural produce of a thing, and all the natural advantages ariſing from it belong as much to the proprietor, as the thing itſelf. But it will be neceſſary, in determining queſtions of this ſort, to diſtinguiſh between the fruits, which come from the thing itſelf, and thoſe, which are produced by the labour and at the expence of the occupier. The former are what I call its natural produce; and of theſe

[g] Grotius Lib. II. Cap. X. § I. II.

only

only we ſpeak, when we maintain, that there is the ſame obligation to reſtore the fruits of a thing, as to reſtore the thing itſelf: for certainly my property in a thing can never give me a right to another perſons labour. Suppoſe the thing poſſeſſed to be common-field land, which produces nothing, unleſs it is manured, tilled, and ſowed: if the honeſt poſſeſſor has a crop of corn upon the ground, at the time of diſcovering the true owner; he would be under no obligation of reſtitution as to the corn; becauſe it was produced by his labour and at his expence: the corn is not the natural produce of the thing, which the other has a right to. But if it was a meadow with a crop of graſs upon it, the poſſeſſor could have no claim to the graſs; it is part of the meadow itſelf, or is the natural produce of it, and conſequently belongs to the owner of the thing, and is not due to the labour of the poſſeſſor. In like manner the young of cattle, as they are their natural fruit or produce, belong to the owner of the cattle, and are to be reſtored to him. If the ſire belongs to one of the parties and the dam to the other; the young naturally belong to the owner of the dam, after a very ſmall ſatisfaction is made to the owner of the ſire. For though the ſire contributed to the production of the young, yet numberleſs accidents might have happened, after his act was over, to hinder the production. His owner therefore has no right to more, than what the chance, that young would be produced, was worth, at the time of his act.

Honeſt poſſeſſor not obliged to damage himſelf by reſtitution.

IV. As the obligation to make reſtitution, which we have been ſpeaking of, guards againſt any injury, that might be done to the owner of a thing; ſo it is reaſonable, that ſuch limitations ſhould be fixed to this obligation,

obligation, as will guard the honeſt poſſeſſor from ſuffering any injury. The general limitation is, that the poſſeſſor is not obliged to ſuffer any loſs, in what he has a right to, by making reſtitution. For ſince the owners claim extends no farther than his property, the obligation of the poſſeſſor can extend no farther.

From hence it appears; Firſt, that if the true owner cannot be put into poſſeſſion without ſome expence, the honeſt poſſeſſor is not obliged to be at that expence: nor is he obliged to be at any more trouble in making reſtitution, than he is paid for; becauſe the other has no more right to his labour, than to his money.

Secondly, if the poſſeſſor has made any improvement in the thing, whilſt he ſuppoſed it to be his own, he has a natural right to be paid for his labour and materials. Thus if he has built a houſe upon ground, which he was honeſtly poſſeſſed of, the proprietor, as his claim reaches only to the ground, can have no natural right to the houſe, ſo as to hinder the other from pulling it down, unleſs he pays for the materials and workmanſhip.

Thirdly, though, as we have ſeen already, graſs, whilſt it is growing, is the natural produce of the land, yet if it has been cut and made into hay, the honeſt poſſeſſors labour is joyned to it, and he has, as in this inſtance, ſo in all others of the ſame ſort, a natural right to be paid for his labour in collecting what is in itſelf the fruit of the thing poſſeſſed. But then this labour is all, that he ought to be paid for: and however it might be urged, that the fruits would have been ſpoiled, and conſequently would have been worth nothing, if he had not collected them; this will give him no right to the fruits themſelves. For ſuppoſe, which

is

is the ſtrongeſt light the caſe can be put in, that the value of the labour is vaſtly greater, than the value of the fruits; yet it cannot upon this account ſo over-rule the claim of the proprietor, as to ſet it aſide: ſince no ſatisfactory reaſon can be given, why, by joyning a more valuable right of mine to a leſs valuable right of another man, the whole ſhould be made my own.

No obligation to reſtitution where the thing has periſhed.

V. Grotius under this head has explaned ſome particular caſes relating to the honeſt poſſeſſors obligation to make reſtitution. Some of theſe caſes have been conſidered already; others do not belong to this head, and ſhall be conſidered in their proper places; the reſt theſe are, which follow; [r] Firſt, if the goods, of whatever ſort they are, and the natural fruits of them too, have ſo periſhed in the hands of the honeſt poſſeſſor, that no part of them remains, and no advantage has been made of them; he is under no obligation to make reſtitution merely becauſe ſuch goods and the fruits of them have paſſed through his hands. For ſince the proprietors claim is a claim upon the thing only, and not upon the perſon, the obligation of the poſſeſſor extends only to the thing; and conſequently if this and the fruits of it are not in being, the perſon of the poſſeſſor is not chargeable.

Obligation to reſtitution does not extend to all advantage made by the poſſeſſor.

VI. Secondly; [s] Grotius affirms in general, that if the poſſeſſor is at all richer by having had the property of another man in his hands, all the advantage, which he has made, be it of what ſort it will, is due to the proprietor: in particular, if the goods or the natural produce of them are conſumeable, and the poſſeſſor has made uſe of them, he is bound to reſtore the value of them, provided he muſt have uſed as much

[r] Grot. ibid. § III. [s] ibid. § II, V.

of

of his own goods, if he had not been in poſſeſſion of theſe: becauſe, ſays our author, he has in this reſpect been a gainer by the others property. Now of this there is ſome reaſon to doubt. For ſince the proprietor has a claim upon the thing only and not upon the perſon, his claim muſt be at an end, when the thing is no more: as ſuch claim does not extend to the perſon of the poſſeſſor, there is no way, by which it ſhould charge any part of his property with the obligation to reſtitution. In the caſe of diſhoneſt poſſeſſion, as will be ſhewn hereafter, we ſhould have reaſon to determine otherwiſe: for there the diſhoneſt act of the poſſeſſor lays an obligation upon his perſon to make reſtitution; the proprietor, as he has a right to the thing in virtue of his own property, ſo has he likewiſe a demand upon the poſſeſſor, on account of his crime.

No obligation to reſtitution of fruits neglected.

VII. Thirdly; [t] the honeſt poſſeſſor is not obliged to make reſtitution for the natural produce of the thing, where ſuch natural produce has periſhed through his neglect to collect it. For here the fruits or produce, which are the thing in queſtion, are not in exiſtence; and conſequently the claim of the proprietor, which, in caſe of honeſt poſſeſſion, is a claim to the thing only, muſt be at an end.

No obligation, where a thing given is given away again.

VIII. Fourthly; if the thing was given to the poſſeſſor, and he gives it away again, he is not obliged to reſtitution. Unleſs, ſays [u] Grotius, it appears, that he would have given away as much in value out of his own ſubſtance, if ſuch thing had not been in his hands: becauſe, in this caſe, he will have been a ſaver or, in fact, a gainer by the others property. But here again our author has not applyed the neceſſary diſtinction

[t] Grot. ibid. § VI. [u] ibid. § VII.

between

between a claim upon the thing and a claim upon the perſon. And ſince, where the poſſeſſion is honeſt, there is no claim upon the perſon of the poſſeſſor, the proprietors claim can extend no farther than to the thing which belongs to him.

No obligation to reſtore the overplus of price, where a thing bought is ſold again.

IX. Fifthly, there is the ſame objection againſt the determination of [w] Grotius, that if the poſſeſſor bought the thing, and then ſold it again for more than he gave for it, the proprietor has a right to the difference. The price, which the thing was ſold for, is not the thing itſelf, and conſequently is not the object of the proprietors right: ſo that his claim cannot reach it, unleſs that claim affected the perſon of the poſſeſſor.

Reſtitution to be made without reimburſement.

X. Sixthly; the honeſt poſſeſſor, though he purchaſed the thing at a conſiderable expence, is bound to reſtore it, and cannot require the proprietor to reimburſe him. [x] If the poſſeſſor could demand this, the owners right of property would be nothing: ſince there is no value in a right, which a man muſt pay for, before he can aſſert it. But we may add one exception to this rule, which is, that if the thing was in ſuch hands before, that the owner could not have recovered poſſeſſion, without ſome expence and trouble; actual poſſeſſion is then a valuable conſideration to him, and the honeſt poſſeſſor, from whom he receives his goods, may expect an allowance for it. Thus ſuppoſe the goods to have been purchaſed of thieves or pirates; or ſuppoſe them to have been found, when the owner had but little reaſon to expect, that he ſhould ever recover them; the honeſt poſſeſſor may demand ſalvage: becauſe the right of the proprietor, when it was ſo likely to be quite loſt, is not to be

[w] ibid. § VII. [x] Grot. ibid. § IX.

valued

valued to the full worth of it: the difference between its full worth, and the worth which he would have reckoned it of to him, when he was in ſo much danger of loſing it, is due to the honeſt poſſeſſor, by whom it is ſaved.

Goods to be reſtored and not returned to the ſeller.

XI. Seventhly; [y] he, who buys another mans goods of perſons, who have no right to ſell them, cannot return them upon the hands of the ſellers, in order to recover his money again: becauſe, as ſoon as they were in his power, his obligation to reſtore them to the true owner took place. Indeed, if he had diſcovered, that the goods did not belong to the ſeller, before he had completed his bargain, he would not be obliged to complete it, for the ſake of being able to return them to the true owner: for no man can be bound in juſtice to part with his own money, merely that another may recover his right.

[y] Grotius ibid. § X.

CHAP. X.

Of the Right which a Man has in his own Perſon.

I. *Right over perſons reduceable to a right to do certain actions.* II. *What is meant by a right to our liberty.* III. *Law of nature the only original reſtraint upon a mans power of acting.* IV. *Liberty not unalienable.* V. *Reſtraints upon liberty by the law of nature are of three ſorts.* VI. *Duty to God.* VII. *Duty to mankind.* VIII. *Several inſtances of a right in our own perſon.* IX. *Duty to ourſelves.*

Right over perſons reduceable to a right to do certain actions.

I. IN the general definition of right, we have only taken notice of a right to poſſeſs certain things, or to do certain actions. Our rights over perſons are not particularly mentioned in that definition; becauſe they are in effect only rights to do certain actions. Thus the right, which we have over others, is a right to command or direct them; and one of the principal rights, which we have over ourſevels is a right to act as we pleaſe.

In ſome reſpects indeed the right, which a man has in his own perſon, may perhaps more properly be reduced to a right in a thing: of this ſort are the rights, which he has to his limbs, to his health, to his life.

What is meant by a right to our liberty.

II. By liberty we mean the power, which a man has to act as he thinks fit, where no law reſtrains him; it may therefore be called a mans right over his own actions. In the common way of ſpeaking every man is ſaid to have a right to his liberty: but this expreſſion is not ſo accurate, as it might be. For ſince the notion

notion of a perſons liberty conſiſts in having a right over his own actions; to ſay, that he has a right to his liberty, is in effect to ſay, that he has a right to a right over his own actions. However I ſhall neither quarrel with the expreſſion, nor ſcruple to uſe it, as I have occaſion; ſince cuſtom has eſtabliſhed it to import what is ſelf-evidently true, that every man has an independent power to act as he thinks fit, where he is under no reſtraint of law.

Though liberty in the phyſical ſenſe of it, is an independent power of acting, yet when we conſider it in a moral view, our notion of it is leſs extenſive. For if our nature and conſtitution, the circumſtances, that we are placed in, and the authority, which our creator has over us, oblige us to act in a particular manner; then, as far we are under ſuch obligations, we have not an independent power of acting, as we pleaſe. Upon this account, in defining the word liberty, I have called it the power, which a man has, to act as he thinks fit, where no law reſtrains him. It may perhaps be difficult to prove, that man has phyſically an independent power of acting: but the difficulty does not ariſe from any uncertainty in the fact, but from the evidence of it: nothing being ſo difficult to prove as a ſelf-evident propoſition. If any one therefore doubts whether he has ſuch a power, inſtead of attempting any formal proof of it, the beſt way is to refer him to his own experience for conviction.

The law of nature the only original reſtraint upon a mans power of acting.

III. The only reſtraint, which a mans right over his own actions is originally under, is the obligation of governing himſelf by the law of nature, and the law of God. Whatever right thoſe of our own ſpecies may have over us, either to direct our actions to certain

purpoſes, or to reſtrain them within certain bounds, beyond what the law of nature has preſcribed, ariſes from ſome after-act of our own, from ſome conſent either expreſs or tacit, by which we have alienated our liberty, or transferred the right of directing our actions from ourſelves to them. Till this is done, they have no claim of ſuperiority over us: nature has made no difference between one man and another: all, who are of full age, have reaſon of their own to direct them, and a will of their own to chuſe for themſelves. And though, as men may differ from one another in the capacities of judging what is beſt to be done, it may be the ſafeſt way to take the advice of thoſe, who have more ſkill than ourſelves; yet this is matter of prudence only, and not matter of duty. Our reaſon and our will belong as much to us, as their reaſon and their will belong to them: we muſt therefore naturally be as independent of them in directing our own actions, and in chuſing for ourſelves, as they are of us. I would not be underſtood to mean, that no man has a right to force us in any reſpect, till we have given him ſuch a right by our own conſent: for it will appear hereafter, that in many reſpects men have a right to force us to comply with the law of nature. But ſuch a right as this implys no natural ſuperiority in them; ſince in the like inſtances we have the ſame right to force them, that they have to force us.

Liberty not unalienable.

IV. There cannot well be any queſtion, whether our liberty is alienable; at leaſt it is a queſtion, which muſt at firſt ſight be determined in the affirmative; unleſs ſome law can be produced, which forbids us to alienate it: becauſe all our rights are alienable, as far as it is not contrary to any law for us to part with

with them. In fact we find, that in many inſtances our liberty is alienated, and no one queſtions whether it could be alienated or not: for certainly the obligations of promiſes and of contracts, where we bind ourſelves to do what the law of nature would otherwiſe not have required of us, are wholly unintelligible, upon ſuppoſition, that our liberty is the ſame, after we have made ſuch promiſes or contracts, that it was before.

It may be ſaid perhaps, that no man can, abſolutely and without reſerve, renounce his liberty, and transfer the full right of directing his actions to any one elſe: becauſe this would be planely throwing himſelf into a neceſſity of doing wrong, whenever the perſon, to whom he has thus ſubjected himſelf, ſhall think proper to command him. But the whole amount of this objection is, that no man can renounce or transfer a liberty, which he never had. He has indeed a phyſical power of doing wrong; but his liberty in a moral ſenſe is a power of acting, as he pleaſes, where the law does not reſtrain him: he has not therefore the liberty of doing wrong, and conſequently cannot transfer to any one the power of forcing him to do wrong; not becauſe liberty is in itſelf an unalienable right, but becauſe no man can transfer to another a right, which he never had himſelf.

The reſtraints upon liberty by the law of nature are of three ſorts.

V. In order to underſtand how far our liberty extends, or how far we have a right to act, as we pleaſe, by the law of nature, previouſly to any obligations, under which we may have laid ourſelves by any particular compact or agreement of our own; it will be neceſſary to conſider what reſtraints that law has

laid us under, in reſpect of God, in reſpect of mankind, and in reſpect of ourſelves.

Duty towards God.

VI. We are obliged to obey the will of God, as far as we are able to diſcover it; becauſe he is the ſovereign Lord of the univerſe, who made and governs all things by his almighty power, and infinite wiſdom, to whom we are indebted for all the happineſs, that we enjoy at preſent, and upon whom we depend for all the happineſs, that we expect hereafter. By the nature and conſtitution of things he is our ſuperior: ſo that the right, which we have in our own perſons, particularly our liberty, or the right of acting, as we think fit, is ſubject to his authority, and is limited by all the reſtraints, which he is pleaſed to lay upon us.

From this account of the obligation, that we are under to obey the will of God, the other parts of our duty towards him may be eaſily collected. The general name of this duty is piety, which conſiſts partly in entertaining juſt opinions concerning him, and partly in ſuch affections towards him, and ſuch worſhip of him, as is ſuitable to theſe opinions.

It is the buſineſs of natural theology to demonſtrate the exiſtence and the perfections of God, to prove that there is an eternal omnipreſent being, of infinite power, wiſdom, and goodneſs, who made and contrived the univerſe at firſt, and who ſtill continues to govern and direct it. Where we have ſufficient opportunities of informing ourſelves rightly concerning the exiſtence and the perfections of God; it is our duty to make uſe of theſe informations. We cannot obey his will at all, unleſs we believe that he is; and we cannot obey it as we ought to do, unleſs we have acquainted ourſelves

ourſelves, as perfectly as we are able, with his nature and attributes. If therefore we are obliged to obey his will, we muſt for the ſame reaſons be obliged likewiſe to form true notions and to entertain juſt ſentiments concerning him; to believe his exiſtence and perfections; to admire his wiſdom; to adore his goodneſs; to reverence his power; to acknowledge our dependance upon him; and to honour him, in all our thoughts, and words, and actions, as our maker, preſerver, and governor.

From hence it follows, firſt, that atheiſm, which conſiſts in a diſbelief of his exiſtence, ſecondly, that blaſphemy, which conſiſts in attributing to God ſuch imperfections, as are inconſiſtent with his nature, and thirdly, that profaneneſs, which conſiſts in a wanton or diſreſpectful treatment of his nature and attributes, are all of them contrary to the law of nature.

But though we believe, that there is a God, and have formed true opinions, and entertain juſt ſentiments of his nature and attributes; yet certainly we have not diſcharged the whole of our duty towards him, merely by avoiding atheiſm, blaſphemy, and profaneneſs. By avoiding theſe crimes we only take care not to diſhonour him; but we are capable of doing more than this, we are capable of honouring him by our words and actions, as well as by our thoughts. Our words or actions will bring our pious ſentiments into our own view, ſo as to ſtrengthen and improve them in ourſelves; and they will likewiſe bring them into public view, ſo as to excite the like ſentiments in other men. Since therefore it is our duty to honour God, and ſince we honour him in the beſt manner, that we can, by ſtrengthening and

improving our own pious ſentiments of him, and affections towards him, and by exciting the like ſentiments, and affections in other men; it follows, that ſome external worſhip of him, both private and public, is a duty, and that irreligion or the neglect of ſuch worſhip is a crime by the law of nature. If it was otherwiſe, I know not how we ſhould be able to prove, that the law of nature forbids idolatry, which conſiſts in paying this external worſhip to a falſe god, or in attributing, by our words and ſignificant actions, the power, wiſdom, and goodneſs of the creator to ſome of his creatures, to the work of our own hands, or to the inventions of our own imaginations: provided they, who pay ſuch external worſhip to a falſe god, entertain in their minds juſt and proper ſentiments of the true one. For, if external worſhip is an indifferent action, and is not due to God, he is not at all diſhonoured, when we pay it to another. So effectually do they, who endeavour to ſet aſide the obligations of prayer and thankſgiving, defend the worſhip of images, as it is explaned at preſent in the church of Rome.

We may go one ſtep farther. If God has at any time been pleaſed, by any poſitive revelation, to explane his nature, or to publiſh his will to mankind, and to afford us proper and ſufficient evidence, that ſuch revelation came from him; the law of nature will not allow us to treat it with contempt and ridicule, for this is profaneneſs. Nor are we at liberty to reject it without examining the evidence, by which its pretenſions to be a revelation from God are ſupported: becauſe, as we are obliged to obey his will, and to entertain true and juſt ſentiments concerning him,

him, we cannot but be obliged to make uſe of our beſt endeavours to diſcover what his will is, and to inform ourſelves rightly concerning his nature and attributes.

It will likewiſe be contrary to the law of nature to reject ſuch a revelation, even after we have examined it; if God, who perfectly knows the extent and limits of the human underſtanding, who is fully acquainted with the juſt meaſures of credibility, and with the reaſonable grounds of aſſent, has atteſted ſuch revelation with what appeared to him ſufficient evidence for convincing mankind of the truth of it. Whoever rejects a revelation ſo atteſted does not pay the obedience, which is due, by the law of nature and the conſtitution of things, to the authority of God.

VII. Our right over our own actions is reſtrained in reſpect of mankind by the natural duties of juſtice and benevolence. We have ſeen already from whence our obligation to theſe duties is derived, and wherein the duties themſelves conſiſt. And ſince juſtice conſiſts in doing no cauſeleſs harm to others, there muſt be as many ſorts of injuſtice as there are perfect rights belonging to mankind, by the violation of any of which we may do them cauſeleſs harm. Duty towards mankind.

Some acts of injuſtice have particular names given to them. Thus the cauſeleſs taking away a mans life is murder. — If the perſon murdered was our parent, it is paricide. — If we owed him any ſpecial obedience, ſuch as a ſubject owes to his prince, a ſervant to his maſter, or a wife to her huſband, it is treaſon. — Injuring a man in his bed, or violating that right, which he has to the affection and to the perſon of his wife, is adultery. — Injuring him in his liberty by cauſeleſsly taking

taking it from him is falſe impriſonment.—Takin away his property againſt his conſent, if it is don privately, is theft; —if it is done publicly and b violence, it is robbery; — if great numbers are con cerned in ſuch an act of violence, it is rapine.—If b ſome deceit or artifice he is led to give his conſent t part with his property, when, if he had known th truth, he would not have parted with it, this is fraud There are ſome acts of injuſtice, the names of whic do not want any definition; becauſe the name itſe ſufficiently expreſſes the nature of the act: of this ſor are maiming, defacing, breach of contract, defama tion, falſe evidence, &c.

We may likewiſe do injuſtice to a man, in reſpec of his property, not only by taking it from him un juſtly at firſt, but likewiſe, as has been ſhewn already by keeping it, or not reſtoring it to him, though w at firſt came honeſtly by it.

Benevolence is a general word, and ſignifies a diſpo ſition of doing good to any perſon or in any manner But this general diſpoſition has a different name give to it, according to the different objects of it, or th different ways in which it exerts itſelf. — When it i directed towards them, who have been kind to us, i is called gratitude.—When the diſtreſſed and afflicted are the objects of it, we call it pity.—When our enemies ſhare, in it, we call it generoſity.—If it lead us to ſtudy the quiet of mankind by being mild in the judgements, that we paſs upon their conduct, and backward to cenſure their failings, we call it candour. —If it is employed in checking our pride and in pre venting us from being ſo much puffed up, either by the ſtation, that we are in, or by the good qualities that

that we poſſeſs, as to make others uneaſy, we call it humility.—If it exerts itſelf in relieving the poor and wretched out of our ſubſtance, it is liberality:—and the higher inſtances of liberality are called bounty.—If it reſtrains our anger and reſentment, it is patience, forbearance, or long-ſuffering.—If it tempers the ſeverity of juſtice, and ſoftens the rigour of our lawful demands upon ſuch perſons as are in our power, it is mercy.—If it ſhews itſelf in an endeavour to make all men eaſy, who have any occaſion to apply to us, by removing the difficulties of acceſs to our perſon, and by converſing freely and openly with them, it is affability.—If it goes one ſtep farther and ſeeks for opportunities of ſhewing ſuch affability, it is courteſy.—The obligation to theſe ſeveral duties, as they are parts of benevolence, has been made out in its proper place: and whatever power we have of acting for ourſelves, yet in reſpect of mankind we abuſe this power, and apply it otherwiſe, than the law of our nature directs us, when we neglect them.

Several inſtances of a right in our own perſon.

VIII. Beſides our liberty, or the right of acting in what manner we pleaſe, which has been mentioned already, we have ſeveral other rights in our own perſon. A mans life is his own; it is the gift of nature: and whoever deprives him of it, is guilty of injuſtice towards him. His limbs too are his own, for the ſame reaſon: ſo that he is injured by being maimed. He has a right likewiſe to freedom from pain, as far as no law obliges him to ſubmit to it: he is injured therefore, if he is cauſeleſsly hurt by any blow, or wound. He has ſtill a farther right to his good name, that is, to all the advantages or all the ſatisfaction, which he can receive from being thought or ſpoken of, as he deſerves;

deſerves: ſcandal therefore and defamation are injuries to his perſon.

Duty towards ourſelves.

IX. But it is proper to conſider, how far we have a right to diſpoſe of our perſon, or to manage it in any manner, that we pleaſe; whether our liberty, or the power of acting as we think fit, is, in reſpect of ourſelves, under no reſtraint from the law of nature.

It ſeems to be ſelf-evidently true, that no man can have a right to manage his own perſon, or to diſpoſe of it in ſuch a manner, as will render him incapable of doing his duty. For his duty is a reſtraint, which ariſes from the law of nature: he cannot therefore have any right to free himſelf from that, unleſs he has a right to free himſelf from all reſtraints, which the law of nature has laid him under. The conſequence of this is, that a mans right to his life or his limbs is a limited right; they are his to uſe, but not his to diſpoſe of. As they were given him to uſe, whoever deprives him of them does him an injury. But then, as they are not his to abuſe or diſpoſe of, it follows, that he breaks through the law of nature, whenever he renders himſelf incapable of complying in any inſtance with that law, which the author and giver of his life and limbs, has required him to obſerve.

Upon this account we have no right to maim ourſelves; if by ſuch an act we ſhall become unable to diſcharge any of the duties of juſtice or benevolence. And much leſs have we any right to kill ourſelves; ſince by this means we become unable to diſcharge any duty at all. A duty, which we can releaſe ourſelves from at pleaſure, is unintelligible; it is in effect no duty: the law of nature could not in any reſpect be binding upon

upon a man, if we ſuppoſe him to have ſuch a right in his own perſon, that he may at any time, by his own voluntary act, lawfully releaſe himſelf from the whole obligation of it, or in any reſpect render himſelf incapable of performing it.

Upon the ſame principles we may eaſily underſtand, that all ſuch luxury or intemperance, in eating or drinking, as either fills up too much of a mans time, and takes him off from his duty, or by diſordering his underſtanding, clouding his judgement and impairing his health, incapacitates him for the performance of ſuch duty, are not within the bounds of his liberty; his power of acting, as he thinks fit, is reſtrained in theſe inſtances by the law of nature.

Some duties of chaſtity are planely ſuch as reſpect not only ourſelves, but likewiſe other men; becauſe a breach of thoſe duties is an injury to others. Of this ſort are adultery, and rapes: to which we may add the debauching virtuous women; becauſe thoſe women are thus deprived of their credit and reputation, and the peace and quiet of their family and relations are broken in upon. The conſent of the woman, who is debauched, can no more excuſe the injury, than the conſent of a perſon, who is cheated out of his property, can excuſe the fraud. To raiſe and enflame her paſſions, till it is not in the power of her reaſon to control them, and then to take the advantage of that weakneſs, which he, who debauches her, has been the occaſion of, is the ſame thing in effect, as to miſlead a perſon underſtanding, and then take the advantage of his ignorance to cheat him out of his property.

There

There are other breaches of chaſtity, which the law of nature forbids; becauſe they fruſtrate that end, for which the deſire of the ſexes towards each other was implanted by nature. Amongſt theſe breaches of chaſtity, beſides thoſe of the groſſer ſort, we may fairly reckon common proſtitution, and the debaucheries of ſuch, as indulge their luſts with common proſtitutes.

Having thus conſidered the rights, which a man has in his own perſon, and the ſeveral reſtraints, under which theſe rights are laid by the law of nature; we ſhall now paſs on to the conſideration of thoſe rights which he has over the perſons of others.

CHAP.

CHAP. XI.

Of Parental Authority.

I. *Right of parents whence derived.* II. *Fathers authority ſuperior to mothers.* III. *Three parts of childhood.* IV. *Parental authority in the firſt part of childhood.* V. *Parental authority properly ſo called ceaſes in the ſecond part of childhood.* VI. *Honour due to parents in the third part of childhood.* VII. *Variations in parental authority ſhew the origin of it.* VIII. *Natural minority what.* IX. *What right of puniſhment included in parental authority.* X. *The law of nature may in ſome caſes allow parents to ſell their children.* XI. *Adoption is different from purchaſe.*

I. WE acquire a [z] right over the perſons of others three ways; by generation, by their conſent, or by their having committed ſome crime. Right of parents whence derived.

The right, which parents have over their children, ariſes originally from generation, not as its immediate, but only as its remote cauſe. If we were to follow Grotius, and to aſſign generation as the immediate cauſe of parental authority; there are ſeveral incidents in this authority, which we ſhould not be able to explane. I chuſe therefore rather to conſider generation as the remote cauſe, and the duty of the parents, which ariſes from thence, as the immediate cauſe of that authority, which they have over the perſons of their children.

It is the deſign of God, as far as we can collect it from his works, that the ſpecies of mankind ſhould be

[z] Grot. L. II. C. V.

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continued: and as this cannot be done, unleſs children, when they are born, have ſome care taken of them; it is the duty of mankind to maintain and provide for them. But ſince their maintenance and proviſion will neceſſarily be attended with ſome expence and trouble, ſuch expence or trouble cannot juſtly be laid upon any other perſons, but upon thoſe, who were the occaſion of it, that is, upon the parents. They therefore, becauſe they produced the child, are obliged to maintain it, and to provide for it. Now it would be an injury to mankind to bring up a perſon in ſuch a manner, as to be hurtful or burdenſome: and upon this account the parents are obliged, not merely to maintain the child, but likewiſe to educate it in ſuch a manner, as to prevent its being hurtful, and to fit it for ſome uſeful employment, that it may not be burdenſome. But the manners of the child could not be ſo formed, as to render it uſeful, or even preſerve it innocent, unleſs the parents have ſome authority over it. And ſince nature cannot be ſuppoſed to preſcribe a duty to the parents, without granting them the means, which are neceſſary for the diſcharge of ſuch duty; it follows, that nature has given the parents all the authority, which is neceſſary for bringing up the child in a proper manner.

Fathers authority ſuperior to mothers.

II. Both the parents have authority over the child, becauſe the duty of maintaining and educating it belongs to both. However, if the commands of the father and of the mother ſhould at any time happen to claſh; the father is rather to be obeyed; upon account, ſays [a] Grotius, of the excellence of his ſex. And yet in his method of explaning the origin and foundation of parental authority, this reaſon can be of no weight:

[a] Grot. ibid.

becauſe

becauſe upon ſuppoſition, that generation is the immediate cauſe of the power, which the parents have over the child, the mother, who contributes as much as the father, or more, if we conſider the trouble and uneaſineſs of geſtation, muſt have an authority equal to the fathers, if not ſuperiour to his. But if generation is conſidered only as the remote cauſe, and the duty of the parents, to bring up the child and to form its manners, is conſidered as the immediate cauſe of their authority; then the fathers authority will be ſuperiour to the mothers, upon account of what may be called the excellence of his ſex: for he is in general with good reaſon ſuppoſed to be better able than the mother to defend and to inſtruct it: and in proportion as his abilities are greater, his duty, and with it his authority, muſt be greater likewiſe.

Three parts of childhood

III. [b] The whole time of childhood may be diſtinguiſhed into three parts. The firſt is the age of infancy or minority; before the child has arrived at a perfect judgment to chuſe for itſelf. The ſecond is that part of the childs life, after it is paſt its minority, whilſt it continues a member of the parents family. The third is ſo much of the age of maturity as remains, after the child has joyned itſelf to ſome other family, or has erected a family of its own. For want of a better word, I have here made uſe of the word childhood in a more looſe ſenſe, than it commonly is uſed, to ſignify all the time of a perſons life, that paſſes, whilſt his parents are living.

Parental authority in the firſt part of childhood.

IV. In the firſt part of childhood, that is, during the infancy or minority of the child, all its actions are under the abſolute authority of its parents.

[b] Grot. ibid. § II. [c] ibid.

As it has then no reaſon of its own to judge and no will of its own to chuſe what is beſt; the parents, whoſe duty it is to take care of it, are to judge and to chuſe for it. But no power can be more abſolute than this; where the reaſon of the parents is the ſole guide of the child, and where its will is concluded by theirs.

However though the authority of the parents, as far as it reaches, is abſolute as to the degree of it; yet it is not unlimited as to the extent of it. For ſince it ariſes out of the duty of the parents to provide for the good of the child, they have no authority knowingly and deſignedly to treat it or to diſpoſe of it in ſuch a manner, as will be hurtful to it. Their duty to maintain and to educate it can never be reaſonably ſuppoſed to give them a right to maim, or to expoſe, or in any way to neglect it.

But whatever promiſes or contracts the child engages in, or whatever other acts it does, without the conſent of its parents, all ſuch acts are void: it has no moral power of acting foritſelf, for want of reaſon and choice; and upon this account whatever acts it does will, as to any moral effect, be as if they had not been done.

Parental authority properly ſo called ceaſes in the ſecond part of childhood

V. In the [d] ſecond part of childhood, that is, when the child is come to maturity of judgment, but continues in the family of its parents; they have no parental authority, properly ſo called, over any of its actions. The authority of the parents ariſes from their duty to provide for the child and to take care of it, whilſt it is unable to govern and direct itſelf: this authority therefore muſt neceſſarily ceaſe, when the duty ceaſes, upon which it is founded: after the child is able to think

[d] Grotius ibid. § II.

and

and to judge for itſelf, it is no longer the duty of the parents to think and to judge for it; and conſequently the will of the child is no longer under the abſolute control of their will.

However in this part of its life they have a demand upon it of gratitude, eſteem, and reverence: it is ſtill bound to honour them, by ſhewing them all marks of reſpect, and more particularly by paying a deference to their advice and direction: for as they, from their longer experience, are more likely to judge rightly than the child is; ſo their former care of it may convince it, that they are diſpoſed to contrive for its welfare. But notwithſtanding the child owes them this duty of honour; they have not, as its parents, ſuch authority over it, as will make void any acts, which it does without their conſent, or even againſt their commands: becauſe the obligations to theſe duties are of the imperfect ſort; the perſon, who tranſgreſſes them, does not uſe his liberty agreeably to the law of nature; but the law does not ſuppoſe him void of ſuch a power of acting, as is ſufficient to give a validity to what he does. If a mans parents have any more authority over him than what has been deſcribed; it is an authority, which ariſes from his own conſent, as a member of that family or community, wherein he continues, and of which his parents are the head.

Honour due to parents in the third part of childhood.

VI. In the [e] third part of childhood, when the child has not only arrived at maturity of judgment, but has either joyned itſelf to another family, or is become the head of a family of its own; the obligations of gratitude, deference, and eſteem ſtill continue, as long as its parents live: for the reaſons, upon which theſe du-

[e] Grot. ibid. § VI.

ties are founded, are perpetual. But as in the ſecond part of childhood, ſo much more in this, no acts of the child, however wrong they may be for want of the parents conſent, will upon that account be invalid.

Variations in parental authority ſhew the origin of it.

VII. Grotius allows that theſe variations, which we have been mentioning are incidental to parental authority. And ſuch variations are eaſily accounted for, provided this authority ariſes immediately from the duty of the parents, and remotely only from generation: becauſe as the duty of the parents, in the firſt part of childhood, is different from their duty, in the ſecond and third part of it; an authority, ariſing from that duty and depending upon it, will naturally vary with the duty. Whereas upon his own principle, that generation is the immediate cauſe of parental authority, it will be difficult to find out any reaſons, upon which theſe variations can be explaned: becauſe a relation, which ariſes from a perſonal act of the parents, cannot be changed: and conſequently an authority, which depends upon this relation as its immediate cauſe, muſt be uniform or continue always the ſame, as long as the perſon continues, from whoſe act the relation aroſe.

Natural minority what.

VIII. [f] The law of nature cannot be ſuppoſed to fix any preciſe age, at which the abſolute authority of parents ſhall in all caſes ceaſe, and all perſons univerſally ſhall be looked upon to be capable of acting for themſelves. Perſons are then arrived at maturity, when they come to the uſe of their reaſon. But this happens at different times of life in different countries: in ſome climates the mind ripens faſter, and attains to the uſe of reaſon ſooner, than it does in others. In the ſame

[f] Grotius Lib. II. Cap. XI. § V.

country

country too, it happens at different times of life to different perſons: all, who live in the ſame climate, do not come to maturity of judgment at the ſame age. No particular perſon therefore can be ſaid naturally to have arrived at years of diſcretion, or to be capable of acting for himſelf; till we have obſerved how that particular perſon behaves in common life: when he ſhews by his behaviour, that he has the uſe of his reaſon, then, and not till then, he is paſt his natural minority.

Civil laws do indeed uſually fix ſome certain age, as the limit of minority for all the ſubjects. But if theſe laws are intended to copy nature as nearly, as general rules can copy it, in a point where there is naturally ſo much uncertainty; a different age muſt be fixed in different climates. Nor can the propereſt time be ſettled in the ſame climate, till long experience and many obſervations have ſhewn at what age the judgment of men in that climate is uſually ripe. And ſince in the ſame climate ſome few arrive at the uſe of reaſon much ſooner, and ſome few are much longer before they arrive at it, than the generality of the inhabitants; the laws of each country will copy nature the cloſeſt, if they fix the limit of minority neither at the earlieſt, nor at the lateſt age, when any perſon has ever been known to arrive at maturity of judgment; but at the middle age between thoſe extremes, at the age when the generality have been found to arrive at it. Extraordinary inſtances are not the proper meaſure of nature; they are not the ſtandards, whereby to fix a general rule, but are rather to be looked upon as exceptions from ſuch a rule.

What right of punishment included in parental authority.

IX. The [s] authority, which parents have over their children, implys a power to punish or correct them; as far as such a power is necessary for obtaining the end, which that authority has in view. Since it is the duty of the parents to contrive for the good of the child, and to direct it to what is best for it, whilst it is incapable of judging and chusing for itself; as far as this end cannot be obtained without correction, they have a right to punish it: because nature cannot be supposed to enjoyn an end, such for instance as the good of the child, to be pursued, without allowing such correction, as is necessary for obtaining that end. But then the end, which is the good of the child, limits the right of punishing: the parents cannot upon this principle have a right to inflict any punishment, but what is for the childs benefit.

From hence it follows, that the power of a parent to correct his children does not extend to the inflicting any capital punishment: because the childs good cannot be the end proposed in taking away the childs life; nor can such a punishment be in any manner consistent with the parents duty to take care of it, to bring it up, and to contrive for its benefit. Wherever parents have had any right of punishing more extensive than what has been described, in the second or third parts of childhood; this right must have been derived from some other principle, and is no part of parental authority.

We may observe by the way, that as the power of parents to punish their children is limited to correction for their good during their minority, no fault of a child can justify the parents, if they disinherit it so

[s] Grot. Lib. II. Cap. V. § VI.

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far as to deprive it of ſuſtenance, where it is under age and unable to provide for itſelf: becauſe ſuch a diſheriſon would in effect be a capital puniſhment, as it would leave the child to ſtarve. After it is come to ſuch an age, as to be able to provide for itſelf, the faults which it commits, may juſtify a diſheriſon of this ſort: not becauſe the parent has then any more right to inflict a capital puniſhment, than he had before; but becauſe he is then releaſed from the duty of maintaining the child, and may diſpoſe of his own goods in any proper manner that he pleaſes.

The law of nature may in ſome caſes allow parents to ſell their children.

X. [h] Where parents from the birth of the child, or at any time afterwards, whilſt it is under their authority, are unable to ſubſiſt it; there ſeems to be no reaſon againſt their ſelling it to any one, who will undertake the expence and trouble of bringing it up. For nature, if it has preſcribed to parents the duty of providing for the ſubſiſtence of their children, cannot diſable them from making uſe of the only means, that they have in their power, of diſcharging this duty. Grotius, conſiſtently with his own account of the origin of parental authority, maintains, that the relation or habitude of a parent, which ariſes from the act, whereby the parents become the authors of the childs exiſtence, can no more be ſeparated from the perſon of the parent, than the perſonal act itſelf can. Yet in the mean time he contends, that the child may be ſold, in order to make a proviſion for it, when the parents themſelves are unable to ſubſiſt it. But upon his principles, ſuch a ſale would be unintelligible: for unleſs the purchaſer acquires at leaſt the authority of the parents over the child ſo purchaſed, nothing

[h] Grotius ibid. § V.

is done by it: and it is impoſſible for him to acquire this or any other degree of authority, if this authority ariſes from a perſonal act of the parents, or from a relation depending upon that act, which is in its own nature inſeparable from their perſons. But upon the principles here laid down, the purchaſer by undertaking the duty of the parent, ſo far at leaſt as to maintain the child, acquires with it the parental authority. The uſual event of ſuch a ſale is the ſlavery of the child: which event neither is nor can be brought about by the ſole act of the parent, unleſs ſome other accident intervenes. By what accident this event is brought about will hereafter be the ſubject of a more particular enquiry.

Adoption is different from purchaſe.

XI. In like manner, when a child is adopted, ſo that the parent, who adopts it, does by his own voluntary act take it for his own, or engage for the care of it; he does by this act, with the conſent of the natural parent, acquire a parental authority over it: for this authority goes along with parental duty, and is inſeparable from it.

I have not ſuppoſed the childs conſent to be neceſſary in adoption; becauſe, if it is under age, its conſent is included in the conſent of its parents. But if it is of ſuch an age, as to have reaſon and a will of its own, the conſent of the party adopted is neceſſary, and adoption cannot proceed upon the ſole act of the parents.

It may perhaps be aſked, if the conſent of the parents includes that of the child in caſe of adoption, why might not parents upon the ſame principle ſell their children into direct ſlavery, or why is any thing elſe neceſſary to make the child a ſlave, beſides the

conſent

conſent of the parents, when they ſell it. The difference of theſe two caſes will readily appear, if we conſider, that the parents authority over the child ariſes from his duty to provide for its good; and conſequently, where the good of the child is not the end propoſed, this authority is nothing. Now adoption is for the childs benefit; and upon that account the act of the parent is binding upon it. But if the child ſhould be ſuppoſed to receive any benefit by ſlavery, which ſcarce can be ſuppoſed, yet this benefit is not the end deſigned by ſlavery: the good of the maſter is the principal point in view; the good of the ſlave is merely accidental.

CHAP.

CHAP. XII.

Of Promiſes.

I. *What obligations ariſe from declaring our future intentions.* II. *Promiſes what.* III. *Promiſes of giving the ſame in effect as promiſes of doing.* IV. *Promiſes always relate to future time.* V. *Promiſes do not affect the heirs of the promiſer.* VI. *No obligation from promiſes where there is no liberty.* VII. *No promiſe obliges to an impoſſibility.* VIII. *Unlawful promiſes not binding.* IX. *A ſubſequent promiſe cannot bind, where it is contrary to a former promiſe.* X. *Obligation of a promiſe may be in ſuſpenſe.* XI. *Promiſes not to be evaded by a ſuppoſed tacit condition of circumſtances continuing the ſame.* XII. *Promiſes of infants, ideots, and madmen do not bind.* XIII. *Raſh promiſes in what ſenſe binding.* XIV. *Promiſes become binding by acceptance.* XV. *Signs of conſent in promiſes and acceptance.* XVI. *Fear makes a promiſe void in ſome inſtances, not in others.* XVII. *Erroneous promiſes how made void.* XVIII. *A mans agent may promiſe for him.* XIX. *Voluntary agent does not oblige.* XX. *What promiſes may and what may not be recalled when they paſs through a third hand.* XXI. *Effects of acceptance by another either with or without commiſſion.* XXII. *A mans heirs cannot accept a promiſe for him.*

What obligations ariſe from declaring our future intentions.

I. THE rights, which we acquire by promiſes, or contracts, or oaths, ariſe from the conſent of thoſe perſons, over whom ſuch rights are acquired. And as none of our rights are more neceſſary to be rightly underſtood than theſe; it will be worth our while to conſider them at large.

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We may do good to other men, either by our property or by our actions, that is, either by giving them such things, or by doing them such services, as will be of use to them.

When we intend to do them any good hereafter, which we either do not chuse to do, or have not an opportunity of doing at present; the three ways, which [i] Grotius mentions of expressing ourselves concerning such future intention, may be reduced to two.

First, we may merely declare what our present intentions are, by saying, that we design to give them such or such things, or that we design to do them such or such services. Here, says Grotius, all, that is required to justify our declarations of this sort, is, that we speak the truth, or that, at the time of making the declaration, we have the same intentions, which our words express. For the mind of man, as our author goes on, has not only a natural power, but a right likewise, to change its design. But he ought to have added, unless it is under an obligation to continue in the same design. Now such a declaration, as we have been speaking of, made in my favour does not indeed give me a perfect right over the person of him, who made it, or over the thing, which he designs to give me; and consequently it does not lay him under a perfect obligation either of doing me the service or of giving me the thing: but yet it lays him under such an obligation as a wise or a good man will attend to. A wise man would not willingly lay himself open to the charge of levity, of forming his designs by chance, and altering them again without reason. And unless the

[i] L. II. C. XI. § II. III. IV.

motives,

motives, which engage him to change his deſigns are notorious and weighty, he cannot eaſily eſcape this charge, if he does not act up to what he has declared. Beſides; we are apt to alter our ſchemes of life, to bring the expected profit or ſervice into our plan of happineſs, and to live, as if we were to receive it. A diſappointment therefore does not leave us in the ſame condition, that we ſhould have been in, if no ſuch hopes had been raiſed: our purſuits will have been changed by them; and we ſhall perhaps have loſt ſight of what might have been obtained, if we had continued to purſue it, and had not been called off to another ſcheme of happineſs by theſe deluſions. What is ſtill worſe, we may have been led to live more expenſively, in expectation of having our fortunes bettered, or to engage in difficulties, out of which we cannot extricate ourſelves, in hopes of ſuch ſervices, as would have enabled us to ſurmount them. This may be ſaid in ſome meaſure to be our own fault; we ought perhaps to look upon all future events as uncertain, and never to depend ſo much upon them, as to be hurt, if we are diſappointed. But allowing this to be always the caſe, a good man would never, if he can avoid it, be even the innocent cauſe of hurt to others. However in fact it is not always ſo: there are many favours, which a man is not capable of receiving without changing his way of life: what therefore is he to do, where he is made to expect ſuch favours as theſe? It would be imprudent in him, if he did not qualify himſelf to receive them; when declarations are made, that ſuch favours are deſigned him: and if he does change his way of life, or his courſe of ſtudies, in order to qualify himſelf for them, a diſappointment

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robs him of other advantages, which he might have expected by going on in his former purſuits, or of advantages, which he was ſure of, if ſuch falſe hopes had not been raiſed in him, as engaged him in expences, that his fortunes, without the expected improvement in them, were not able to bear. A wiſe man therefore, for his own ſake, or out of regard to his own character, and a good man, for the ſake of others, or out of tenderneſs to their welfare, will take care to keep his deſigns to himſelf, and to make no declarations about them; till he has well conſidered the matter, and finds no likelihood, that any thing will intervene, which may oblige him to fail in making them good. Or if he has been led to declare ſuch favourable intentions, he will take care to abide by them, and to bring them into execution; unleſs the accidents, which prevent him, are ſuch, as may appear to the world, and ſuch too, as will juſtify him in the common opinion.

We may go one ſtep farther in this way of ſpeaking about what is future; we may not only declare what our preſent intentions are, but may add, that theſe intentions are not unſteady, that we are not only in earneſt now, but will continue in the ſame mind, when the time comes for putting theſe intentions in practice. This additional declaration does not confer any perfect right upon the perſon, in whoſe favour it is made, or does not give him any ſtrict demand upon us. But it ſtrengthens our reaſons for making our deſigns good; both becauſe it would be an inſtance of greater levity to change what ſeems to have been thus fixedly and unalterably reſolved upon; and becauſe a diſappointment to thoſe, who are made

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to expect our favours, will be ſo much more hur ful, in proportion as their expectations were raiſe higher.

Promiſes what.

II. The ſecond way of ſpeaking concerning ou preſent intentions of giving a man hereafter what ma be uſeful to him, or of doing for him hereafter ſom beneficial ſervice, is by making him a promiſe. Th is not merely a declaration of our preſent intentions reference to ſome future gift or ſervice, with a ſuff cient ſign of our being in earneſt, and of our havin determined with ourſelves to continue in the ſam mind; but it contains likewiſe a declaration that w now deſign to give him a right to demand ſuch gift o ſuch ſervice hereafter.

Promiſes of giving the ſame in effect as promiſes of doing.

III. [k] Grotius ſeems to make a ſmall difference be tween promiſes of giving and promiſes of doing; whe he ſays, that the former are the firſt ſtep towards th alienation of our goods, and that the latter are th actual alienation of ſome part of our natural liberty But it would be difficult, if we follow this diſtinctio cloſely, to ſhew, that any demand at all is conferre by a promiſe of giving: becauſe it does not appea what it is, which he, to whom we make ſuch promiſe, has a demand upon. The diſtinction does no ſeem to allow, that his demand is upon the perſon o the promiſer; for he is not underſtood to have alienat ed any part of his liberty; this being ſuppoſed to b the peculiar effect of promiſes of doing. Nor is hi demand upon the thing promiſed; becauſe the diſtin ction ſuppoſes, that the thing is not alienated, bu only that the firſt ſtep is taken towards the alienation of it. But if a promiſe to give a man a thing

[k] ibid. § VI.

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confers upon him no right, either over the perſon of the promiſer, or to the thing promiſed, it cannot poſſibly confer upon him any right at all: and if he acquires no right by the promiſe, then the promiſer cannot be laid under any obligation by it.

But in truth, there is not in this reſpect any difference between promiſes of giving and promiſes of doing: the obligation of them both is upon the perſon of the promiſer; and they are either of them alienations of his liberty. Before I make a promiſe of giving any particular thing to a man, I am at liberty, whether I will give him it, or not: but after the promiſe is made, I have no moral power or right not to give; in regard to not giving I have parted with my liberty, by conferring upon him a right to demand, that I ſhould act in ſuch a manner as the promiſe expreſſes. He has no claim upon the thing promiſed; becauſe I did not actually give him the thing, but only engaged, that I would give him it; I did not make it his, but gave him a right to demand of me at ſome future time to do whatever act ſhould be neceſſary to make it ſo.

Thus promiſes of giving are in ſome ſort promiſes of doing. The effect of them both is in one reſpect the ſame: they affect the liberty of the promiſer, and tie him down to that particular action, which the promiſe contains or implys. If they are promiſes of giving they tie him down to the action of giving; if they are promiſes of doing, they tie him down to the actions or ſervices, which are ſpecifyed in them.

IV. Promiſes are ſometimes diſtinguiſhed into ſuch as are made in words of future time, and ſuch as are made in words of preſent time. But this diſtinction

Promiſes always relate to future time.

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is without foundation. What is called a promiſe in words of preſent time can ſcarce be ſo explaned, as to give it the appearance of a promiſe: it is either an actual performance, or it is nothing at all.

Promiſes of giving in words of preſent time are actual performances. If I ſay, that I now give you ſuch or ſuch a thing; what is ſo given does, upon your acceptance, immediately become your own; this act is a direct alienation of my property. I may indeed delay putting you into poſſeſſion by adding, that I will deliver to you at ſome future time what is ſo given. This exception, as to the time of delivery, may make the whole matter have the apearance of a promiſe rather than of an actual performance: but then it is to be obſerved, that, as far as this exception is concerned, the words will be of future and not of preſent time. However, if we conſider the effect of ſuch an exception, we ſhall find, that it is in itſelf no promiſe; nor does the act of giving become a promiſe by the addition of it. Such an exception inſtead of conferring any particular right upon you, limits your claim; it is added for my benefit, and not for yours. Upon my giving you the thing, you had a right to immediate poſſeſſion: and by engaging to give you poſſeſſion at ſome future time, I only poſtpone this right. This will be clear, if we obſerve, that when the time of delivery comes, you will have no other right to the actual poſſeſſion of the thing, but what you would have had at the inſtant of giving, if I had not added this limitation. And certainly as ſuch a limitation confers no right, either perfect or imperfect, it cannot with any propriety be called a promiſe, or part of a promiſe.

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As to promiſes of doing in words of preſent time, if we would endeavour to expreſs them ſo as to diſtinguiſh them from promiſes of the ſame ſort in words of future time, we ſhall find them unintelligible. I know not how to promiſe a man a preſent ſervice, unleſs I am actually doing it; and a promiſe of it, whilſt I am actually doing it, is ridiculous.

This diſtinction is ſometimes applyed to promiſes of marriage: but it will be very difficult to ſhew, that there is any ſuch thing as a promiſe of marriage in words of preſent time, which is not an actual marriage. If the man promiſes to the woman, that he will marry her; this is promiſing in words of future time: if he declares, that he does marry her, there is nothing naturally wanting but her acceptance to complete the marriage. It is only civil inſtitution, which prevents ſuch a tranſaction from being looked upon in any other light. In almoſt all civil communities ſome particular forms and ceremonies are eſtabliſhed for the celebration of marriage. And conſequently, if ſuch forms and ceremonies are conſidered by the law as neceſſary to make the marriage binding upon the parties, the ſame law, which makes them neceſſary, cannot call any act a marriage, where they have been omitted. Now as a mans declaration, that he does marry a woman, is more than a promiſe of marriage; and yet civil laws, for the reaſon before mentioned, decline giving it the name of an actual marriage; a ſort of middle name has been found out for it, and it has been called a promiſe, or becauſe acceptance of ſuch promiſe makes it mutual, it has been called a contract, in words of preſent time.

It may perhaps be apprehended, that ſuch a tranſaction is not called a marriage, but only a promiſe in

words of preſent time, for want of conſummation. But conſummation in marriage is like actual poſſeſſion in gifts. As in giving a thing by words of preſent time, the delay of actual poſſeſſion does not change the act of giving into a promiſe; ſo neither does an agreement, in words of preſent time, between two parties to take each other for man and wife, become no more than a promiſe by the delay of conſummation.

In one view indeed all promiſes may be conſidered as expreſſed in words, which relate to the preſent time. They declare a preſent intention of conferring upon the perſon, to whom we make them, a demand upon us for ſome future performance. To tell a man, that I will give him ſuch a thing, or that I promiſe to give him it, or that I give him a demand upon me for it, are all of them expreſſions, which the common uſe of language has made to be of one and the ſame import: and any of them confer on him a right over my perſon. They do not indeed alienate my property in the thing, or transfer it to him; but they alienate a part of my liberty, and bind me to the future performance of ſuch an act, as will transfer the thing to him. If I promiſe a man to ſerve him in ſuch or ſuch inſtances; if I ſay, that I will do him ſuch or ſuch good offices; theſe and the like expreſſions tie me down to a particular way of acting; they give him a demand upon me ſo to act, or alienate the liberty, which I had of acting in any other manner.

When promiſes of giving and promiſes of doing are thus explaned, there appears to be little difference between them. Both of them are in effect promiſes of doing; ſince each of them conveys a right to the perſon, that we make them to, of demanding that we

we ſhall act agreeably to what is expreſſed in the promiſe. If it is a promiſe of giving; the demand of thoſe, to whom we make it, and conſequently the perſonal obligation, which we are under, is, that we ſhall do ſuch acts, as are neceſſary to transfer to them the thing promiſed. : if it is a promiſe of doing; the demand on their part, and the obligation on ours, is, that we ſhall do ſuch acts, whatever they are, as are contained in the promiſe.

Promiſes do not affect the heirs of the promiſer.

V. From hence we may ſee the reaſon, why the obligations of a mans promiſe do not of themſelves deſcend to his heirs. They are alienations of his own liberty, and conſequently, being obligations upon his perſon only, do not effect his property: even promiſes of giving confer no direct or immediate right to the thing promiſed, but only a demand upon the perſon of the promiſer to give ſuch a right hereafter. Where a man has charged his goods with any obligations; the heir, who cannot receive the goods in any other condition than what the anceſtor leaves them in, is by receiving the goods involved in the obligations, that are connected with them. But all obligations, which reach no farther than the perſon of the promiſer, ceaſe with his perſon. And ſince the obligations of promiſes are of this ſort, it is matter of bounty only, when the heir undertakes to make good the promiſes of his anceſtor.

No obligation from promiſes, where there is no liberty.

VI. Since a promiſe is an alienation of part of our liberty, by giving the perſon, to whom we make it, a demand upon us to act in ſuch a particular manner, as we have engaged for; the conſequence is, that we cannot oblige ourſelves farther by promiſe, than our liberty reaches: for ſince no man can alienate what

does not belong to him, no man can give up that liberty to another, either in whole or in part, which he never had himself.

No promise obliges to an impossibility.

VII. From hence it follows, first; [l] that no promise can oblige us to an impossibility. It is certain indeed, that we could never perform such a promise: but, when I say, that it does not oblige us, I mean something more than this; I mean, that whatever folly there may be in making such a promise, there is no wrong or injustice in not performing it. For where a man has no demand upon us, we can do him no injury: and the person, to whom we make a promise, can have no demand upon us, if the promise is void in its own nature. But since a promise consists in an alienation of a part of our liberty, it must be void, or must be as if there was no promise, where no such alienation has been made. Now we have not, and never could have, the liberty of doing what is impossible; we cannot therefore, in respect of what is so, alienate our liberty, that is, we cannot make such a promise, as will be binding upon us.

Unlawful promises not binding.

VIII. Secondly; [m] no unlawful promises can oblige those who make them. As they have not the liberty of doing what the law has forbidden them to do, they cannot alienate their liberty so as to give any person a demand upon them to do it. When I speak of unlawful promises, I do not mean those only, by which we engage to give or to do what the law of nature forbids to be given or to be done by us: where the matter of a promise is forbidden by any other law, by the positive law of God, for instance, or by the law of the land, or by the commands of our lawful superiours, as far

[l] Grot. ibid. § VIII. [m] ibid.

as they have a right to command us, ſuch a promiſe is void; we have done nothing by making it, and conſequently have not obliged ourſelves to the performance of it. The reaſon why we have done nothing by making it is, becauſe the law, as far as we owe obedience to it, has taken away our liberty; and we cannot alienate our liberty, where we have it not.

IX. Thirdly; a ſecond or any ſubſequent promiſe, which is contrary to one, that was formerly made, cannot oblige us, or cannot make void the former promiſe. When we have once alienated a part of our liberty, it is not our own to diſpoſe of again: when we have given one man a demand upon us to act in a particular manner, we have parted with our liberty in this reſpect, and cannot give another man a demand upon us to act in a contrary manner. What is here ſaid of promiſes is equally true of all other ſorts of voluntary obligations. Any former obligation takes away the liberty of the perſon, who is engaged in it; and where he has no liberty, he can do no act, which will be valid, and conſequently none, which can be binding upon him. Indeed upon any other ſuppoſition, there would be no ſuch thing as any poſſibility of a mans being obliged at all by his own act; which in morality is deemed an abſurdity. For if a ſecond obligation could make void the firſt, then a third might make void the ſecond, and a fourth might make void the third, and ſo on without end.

A ſubſequent promiſe cannot bind where it is contrary to a former promiſe.

X. [n] If the matter of a promiſe is impoſſible or unlawful at the time of making it, but the circumſtances of the promiſer are ſuch, as may be altered, and a change in his circumſtances would render it poſſible or

The obligation of a promiſe may be in ſuſpenſe.

[n] Grotius ibid.

lawful for him to perform his promiſe; it may be queſtioned whether a promiſe of this ſort is binding; becauſe it may be thought, that as the promiſer engaged for what he had, at the time of engaging, no natural or no moral power to perform, his act was originally void; and that no accident, which ſhall happen afterwards, can give a validity to what was ſo void in the firſt inſtance. But here it ſhould be obſerved, that the act is not ſo far void from the beginning, as that no future event can make it binding. Where a man's words can be ſo interpreted as to have any meaning, we are always to follow that interpretation, which will give them a meaning. And if the promiſer had any meaning at all, it muſt be this — that he would give the thing or do the act promiſed, whenever it ſhould be in his power, or whenever by any change in his circumſtances it ſhould become lawful. This condition is ſometimes expreſſed in promiſes of this ſort; and when it is not expreſſed, the rule of interpretation before laid down naturally leads us to ſuppoſe, that it was implyed. But where ſuch a condition is either expreſſed or implyed, notwithſtanding the preſent impoſſibility or unlawfulneſs in the matter of the promiſe, the promiſer does ſomething: he gives thoſe, to whom he thus engages, a demand upon his perſon not to uſe his liberty otherwiſe, upon a ſuppoſed event, than according to the terms of his engagement: he might upon this event have his liberty, but he alienates it beforehand: if the matter of the promiſe ever can be poſſible or ever can be lawful, his liberty of acting is his own in poſſibility; and as far as it is his own, he conſents to part with it. The obligation of theſe promiſes is in ſuſpenſe, and then only takes place, when

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the event happens, which renders the matter of them poſſible or lawful.

Sometimes it depends upon ourſelves, whether it ſhall be poſſible for us, or not, to perform our promiſes: ſome act or ſome endeavours of our own may put us into ſuch a ſituation, as will make the performance poſſible. A promiſe in this caſe binds us to the doing thoſe acts, or to the uſing thoſe endeavours; though ſuch acts and ſuch endeavours are not expreſsly contained in it: for he, who has obliged himſelf to the end, cannot but be underſtood to have obliged himſelf to the neceſſary means. Or rather; nothing can be properly called impoſſible for a man to do, which by his own acts or his own endeavours can be brought about. A promiſe therefore of this ſort is binding from the beginning: and though we have not in expreſs words bound ourſelves to do thoſe acts or to uſe thoſe endeavours, yet if the poſſibility of performing what we have promiſed depends upon them, we are obliged to them in virtue of our promiſe.

Promiſes not to be evaded by a ſuppoſed tacit condition of circumſtances continuing the ſame.

XI. Some have imagined, that all promiſes are to be underſtood to contain a tacit condition, that the promiſer continues in the ſame ſituation, as when he promiſed. I do not mean a tacit condition of being obliged, only if the matter of the promiſe continues poſſible or lawful to him: for there is no occaſion to ſuppoſe ſuch a condition, ſince the obligation of the promiſe, in ſuch a change of ſituation, would ceaſe of itſelf without the help of any tacit reſerve. But I mean a reſerve, that, when the time of performance comes, it ſhall be as convenient to the promiſer to make good his word, as it was at the time of promiſing.

Such a tacit condition as this, if the promiſer is allowed to explane it, will put it into his power, either to be obliged or not obliged, at his own pleaſure. For it is next to impoſſible for the circumſtances of any man to continue ſo exactly the ſame, as not to give him an opportunity of finding out ſome alteration in them, between the time of promiſing and the time of performance. And it would be abſurd to ſuppoſe a condition to be tacitly annexed to any obligation, which is of ſuch a ſort, as to leave the obligation to the diſcretion of the party obliged.

But if the party, to whom the promiſe is made, is to be the judge of the others circumſtances; if it is left to him to determine, whether ſuch a change has happened in them, as to ſet the obligation aſide; ſuch a tacit condition will be of no uſe to the promiſer: he muſt, notwithſtanding this reſerve, ſtand to the courteſy of the party, to whom he is obliged; and he could only ſtand to his courteſy to be releaſed, if we ſuppoſe no ſuch tacit condition.

Men of looſe principles are apt to pretend, that they promiſed under this condition, though they did not expreſs it; not only when the performance of their promiſes, by a change in their circumſtances, is become a real hardſhip, and common benevolence would engage the other party to releaſe them; but when they find, that by breaking their word they may make ſome petty advantage, which they could not make by keeping it. If there was any way of convincing men of ſuch a character, that their promiſes could not ſuppoſe any ſuch tacit condition, it muſt be when in making them, they have expreſſed ſome other condition. The ſureſt way of making a promiſe abſolute,

ute, in all other reſpects, is by annexing ſome one expreſs condition to it. Where one condition is expreſſed, the natural preſumption is, that no other is implyed or underſtood: becauſe if there had been any other in the mind of the promiſer, ſuch a fair opportunity, as that of mentioning one condition would in courſe have led him to mention that other: when he deſigned to make conditions, and was employed about making them, he mentioned only one; we have therefore good reaſon to believe, that he thought of and intended no more. Upon this account the ſtrongeſt form of promiſing is, to annex ſome ſlight condition to the promiſe, ſuch as — If I live; — If I have my ſenſes; — or ſome other of the like ſort.

Promiſes of infants, ideots, and madmen do not bind.

XII. [o] No promiſe is binding, unleſs the perſon, who made it, has liberty to chuſe for himſelf, and underſtanding to direct him in his choice. Without theſe faculties of liberty and underſtanding, he is no moral agent, or is not capable of doing an act ſo as to produce any moral effect by it. Upon this account the promiſes of infants, ideots, and madmen are not binding; they are not moral agents, and are therefore unable to do any valid act.

Raſh promiſes in what ſenſe binding.

XIII. If it ſhould be enquired, whether a raſh promiſe is binding; it would be neceſſary, before we determine upon this queſtion, to examine what is meant by a raſh promiſe. The words are ſometimes uſed to ſignify only a promiſe, which is made unadviſedly, or without ſufficient deliberation, and ſometimes to ſignify a promiſe, where the matter for want of ſuch deliberation is unlawful. As to the latter ſort of promiſes, they are void in themſelves, without conſider-

[o] Grotius ibid. § V.

ing,

ing, whether they are raſhly or adviſedly made; promiſes, if the matter of them is unlawful, are no binding, though they were made with ever ſo much deliberation.

Promiſes, which are called raſh in the former ſenſe merely becauſe they were engaged in too haſtily, if there is no other defect in them, are binding. Every act of a perſon, who has liberty and underſtanding muſt always be conſidered as the reſult of proper deliberation: if he has theſe faculties, the preſumption is that he made uſe of them; and it was his own fault if he did not. If it was otherwiſe, if a mans having theſe faculties was not a ſufficient ground to preſume even againſt his own ſubſequent declaration, that he made uſe of them; there could be no effectual obligation derived from any human act whatſoever; becauſe the agent need only declare in any caſe, after the act is over, that he did not act deliberately, and then the obligation would be void.

Promiſes become binding by acceptance.

XIV. [p] Before we go on to conſider ſome other queſtions relating to promiſes, it may be proper to obſerve, that a promiſe is not binding, till it is accepted. The party, to whom it is made, does not without acceptance acquire any right or demand upon the promiſer: for no right or demand of any ſort can be acquired, without the conſent of him, who acquires it. And unleſs ſome perſon has a demand upon the promiſer, he is under no obligation.

[q] From hence it follows, that a promiſe, after it is made, may be recalled without injuſtice; provided this is done, before ſuch promiſe is accepted: no right or demand is acquired, till the acceptance of the pro-

[p] Grot. ibid. § XIV. [q] Grot. ibid. § XVI.

miſe;

miſe; and where there is no right, there can be no injuſtice. It ought however to be remembered, that as in alienations of property, ſo likewiſe in promiſes, it is not neceſſary for acceptance to follow the promiſe in order of time. When a perſon aſks us to make him a promiſe, and we make it at his requeſt; the promiſe becomes binding immediately; ſo that we cannot juſtly recall what we have done, upon pretence, that he has not accepted it. His requeſt is a ſufficient evidence of his acceptance, though it went before the promiſe; unleſs, by any ſubſequent act or declaration of his, it appears, that he had changed his mind.

[1] There may be ſome doubt perhaps, whether mere acceptance is ſufficient to bind the promiſer, or whether it is not neceſſary, that he ſhould know of ſuch acceptance. When the promiſe is made under either of theſe forms — I will that it ſhall bind me, when it is accepted — or I will, that it ſhall bind me, when I know it to be accepted, — ſuch preciſion leaves no room for this doubt. But when theſe forms are not obſerved, it ſeems to be the truer opinion, that in ſtrict juſtice there is no obligation upon the promiſer, till he knows of the acceptance: becauſe an acceptance, which is not made, and an acceptance, which does not appear, are in reſpect of him the ſame thing. But yet if the promiſer, without waiting a proper time to know the other partys mind, ſhould recall his word, he could not eſcape the charge of levity.

XV. The manner of promiſing, or of refuſing, when a requeſt is made to us, and the manner likewiſe of accepting a promiſe, muſt be ſome external mark of the minds intention. Nods may indeed bear

Signs of conſent in promiſes and acceptance.

[1] Grot. ibid. § XV.

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the conſtruction of conſent, or ſhrugs of refuſal: but theſe are not eſtabliſhed marks either of the one or the other; common uſage has not ſufficiently eſtabliſhed their ſignification. The beſt eſtabliſhed declarations of our mind are words either ſpoken or written. In ſome caſes indeed our conſent may be collected from our ſilence: but then there ought to be ſome ſpecial reaſon, why, if we did not conſent, we ſhould ſpeak: for ſilence, when there was no ſuch reaſon, will not eaſily bear this conſtruction; in many inſtances we might fairly be ſuppoſed to have been ſilent, only because we had no mind to ſpeak.

Fear makes a promiſe void in ſome inſtances not in others.

XVI. [a] Before we can determine, whether we are bound by a promiſe, which is extorted from us by force, or by threatening us with ſome great harm, unleſs we make ſuch promiſe; it will be neceſſary for us to diſtinguiſh whether the force ſo made uſe of comes from the party, to whom we make the promiſe, or from ſome one elſe; and if it comes from him, we muſt diſtinguiſh farther, whether that force is juſt or unjuſt, that is, whether he has any right or not to threaten us with ſuch an evil, as is the occaſion of our making the promiſe. If we were to determine, that no promiſes, which ariſe from fear, are binding, and to ground our determination upon this principle, that the promiſer, when ſuch force is made uſe of as produces his fear, has not liberty to chuſe for himſelf; and is upon that account incapable of binding himſelf, it is plane the words of the queſtion are what lead us to this determination, rather than the ſenſe of it. Force is commonly oppoſed to liberty: and from thence we are induced to conclude too haſtily, that where a pro-

[a] Grot. ibid. § VII.

miſe

miſe is extorted by force, the promiſer has not his liber-
y. But the force here ſuppoſed is not ſuch as will leave
he promiſer no liberty of chuſing for himſelf; he is
orced indeed to chuſe one part of a diſagreeable alter-
ative, either to make the promiſe, or to ſuffer the evil,
with which he is threatened. But however diſagreeable
he alternative may be; yet, when he has two things
o chuſe out of, he cannot be ſaid to have no liberty.
t muſt be a very ill-natured and inhuman doctrine to
each, that the word of a perſon, when he is in diſtreſs,
nd makes a promiſe in hopes of being relieved from
t, is not as much to be relyed upon, as when he is in
full eaſe and happineſs: and yet this muſt be the caſe,
f a promiſe, which we are induced to make from the
pprehenſion of ſome great evil, is not binding upon
us, merely becauſe in ſuch circumſtances we have not
a proper degree of liberty, as having only a diſagree-
able alternative before us, and being forced to chuſe
out of two things, neither of which would have been
the object of our choice, if we had been in a better
condition. Grotius was aware of this; and when he is
conſidering only the ſituation of the promiſer, he de-
termines ſuch an extorted promiſe to be binding.

His opinion, when he come to ſpeak of the other party, is very ſingular, and cannot be made intelligible. If, ſays he, the perſon, to whom the promiſe is made, extorts it by bringing the promiſer into any unjuſt fear, he is obliged to releaſe ſuch promiſer; not becauſe the promiſe was originally void in itſelf; but upon account of the unjuſt damage, which he has done him. But how the promiſe can be valid, and the promiſer not be bound by it; or how the promiſer can be bound, and yet the other party have no demand upon him;

him; or how this other party can have a demand, and yet be obliged to give it up; is above my comprehenſion. An obligation on one part implys a demand or right on the other part. If therefore the promiſe is valid, or, which amounts to the ſame, if the promiſer is obliged to performance, the party, to whom ſuch promiſe is made, muſt have a right to demand performance. But then, as a right to make ſuch demand upon the promiſer is inconſiſtent with an obligation to releaſe him; it follows, that one part of our authors opinion cannot be true: he muſt either allow the promiſe to be void, or muſt give up his notion of the other partys obligation to releaſe the promiſer.

To clear up this matter, let us return to our firſt diſtinction. If the promiſe is extorted by any unjuſt threatenings, and the party to whom it is made is the author of this unjuſt fear; ſuch a promiſe is not binding: not upon account of the promiſers fear, but upon account of the other partys injuſtice. No right can be founded in an injury: every unjuſt act is void, as to all the moral effects of it, and conſequently can never produce a demand in the perſon, who is guilty of it. Now all obligations imply a right, which correſponds to them. Therefore, if there is no right on the part of him, who unjuſtly extorts the promiſe, there can be no obligation on the part of him, from whom it is ſo extorted.

Upon theſe principles it will appear, that all promiſes, which ariſe from fear, and even from unjuſt fear, are not void, though ſome are. If a magiſtrate, by the fear of lawful penalties, forces me to make ſuch promiſes or other ſtipulations, as I ought to have made

made without the uſe of force; my promiſe, notwithſtanding the threatenings and fear, from whence I am induced to make it, will be binding. There is nothing on my part, let the fear ariſe from what cauſe it will, which renders me incapable of binding myſelf: and if it ariſes, as is here ſuppoſed, from a juſt cauſe; there is no injuſtice in the other party, and conſequently nothing which renders him incapable of acquiring a right. Nay even where the fear is unjuſtly brought upon me, my promiſe will be binding; provided the fear ariſes from a third perſon, and the party, to whom I make the promiſe, is not concerned in the injuſtice. If I am afraid of being murdered, becauſe ſome one has threatened it, and promiſe a reward to a perſon for guarding me; though I am unjuſtly brought into this fear, yet my promiſe will oblige me. There is, as in all caſes of fear, nothing on my part, which diſqualifies me from obliging myſelf: and as the guard, to whom I make the promiſe, does me no injury, he is not diſqualified from acquiring a demand.

When therefore we maintain, that an extorted promiſe does not oblige; it muſt always be done under theſe reſtrictions, that we are unjuſtly brought into fear, and that the party, to whom we make the promiſe, is concerned in the injuſtice.

Erroneous promiſes how made void.

XVII. [1] Where ſome miſtake or error in the promiſer is the only real and true cauſe of his making the promiſe; the obligation of ſuch promiſe is void. When the ſuppoſed truth of a fact determines us to make a promiſe, where, if we had been rightly informed, we ſhould have made none, we conſent to be obliged upon ſuppoſition, that the fact is true; and

[1] Grot. ibid. § VI.

conſequently

conſequently the truth of the fact becomes a conditio of our promiſe. If therefore the fact is falſe, the pro miſe muſt be void: becauſe all conditional promiſ are void, where the conditions are not made good; becauſe no man is obliged farther than he conſent and in the caſe now under conſideration, we conſe to be obliged no otherwiſe than upon ſuppoſition, th the fact is true.

It ought however to appear planely from the pro miſers words, or from the circumſtances of the pro miſe, or from the matter of it, that his error was th ſole reaſon, which effectually determined him to mak it: becauſe, if his obligation was to be void, whe this does not appear; it would almoſt always be in h power to make his promiſe void, at his own pleaſur He might pretend, that he was in ſome error, an that, if he had been well informed, he ſhould not hav engaged in ſuch a promiſe. An error, which does no appear, is of no more account in our dealings wit one another, than an error, which does not exiſt the law of nature cannot allow any effect to be obtain ed by what does not fall under the notice of mankind Caius is a candidate for a certain office, and I promiſ him my vote: at the time of making this promiſe, ſuppoſed that Sempronius, to whom I have particu lar obligations, would not be his competitor: but be fore the day of election I find, that he is. If this ſup poſition of mine did not appear at all, if it was no planely the reaſon, which induced me to make thi promiſe, it cannot affect the promiſe, after it is made ſo as to ſet it aſide. I might not have this ſuppoſitio in my mind, or if I had, yet ſince all men are no determined in their actions by principles of gratitude

I ſhould perhaps have made the ſame promiſe, whether I thought about Sempronius, as a competitor, or not. But if, when I engaged to Caius, I expreſsly told him, that I had great obligations to Sempronius, but believed his preſent ſituation to be ſuch, as made me imagine, he would not offer himſelf; a declaration of this ſort planely ſhews, that I had this ſuppoſition in my mind, and that it determined me to engage myſelf to him. Or if Caius, when he applyed to me, had ſaid, that, notwithſtanding my obligations to Sempronius, I might ſafely engage to him, becauſe my friend would not oppoſe him; and in conſequence of this aſſurance, I promiſe my vote to him; though my own words might not ſhew what ſuppoſition determined me to this promiſe, yet the circumſtances would ſhew it planely enough to releaſe me from any obligation, when I find afterwards, that Sempronius is a candidate.

A mans agent may promiſe for him.

XVIII. [u] As we may bind ourſelves by a promiſe, which we make in our own perſon; ſo likewiſe we are obliged to ſtand to a promiſe, which another perſon makes for us, where we have given him either a general commiſſion to act for us in all things, or a particular commiſſion to act in this affair. In either caſe by ſuch a commiſſion, where he keeps within the bounds of it, we have made his act our own.

Where we have given a man a power or commiſſion to act for us, as our proxy; though no reſtriction or limitation of ſuch commiſſion may appear, yet it frequently happens, that we give ſome private inſtructions to ſuch proxy or agent, in what manner we would have him act, and how far he may go.

[u] Grot. ibid. §XII.

Suppoſe him then to act contrary to theſe private inſtructions, and to go farther, than we allowed him; we ſhall be obliged to ſtand to the promiſe, which he makes for us, notwithſtanding our conſent ſeems to be wanting. For that act of our will, whereby he was appointed our agent, which is the only act of our will, that is or can be known by the party, to whom the promiſe is made, is ſufficient to make what ſuch agent does for us be conſidered as our own act. The private inſtructions, which we gave him, cannot affect any one, to whom they are not known, and from whom we were determined to conceal them: they cannot therefore ſo affect the party, to whom the promiſe is made, as to prevent his claim upon us: the conſent, which appears to him, muſt, in reſpect of him, be looked upon as our true and full conſent. If it was otherwiſe, there would be ſuch room for colluſion between the promiſer and his agent, that it would be in their power at any time to prevent any obligation from ariſing upon promiſes thus made.

However, though our limitations or ſecret inſtructions, in reſpect of the party, to whom the promiſe is made, are conſidered as not in exiſtence; becauſe they neither do nor can appear to him, and conſequently cannot invalidate his claim, which ariſes from our publick conſent or apparent act; yet they will produce their proper effect upon the perſon, to whom they are known. Our agent knows them, and the effect, which they produce upon him, is to make him anſwerable for any loſs or damage, that we may ſuſtain by his having exceeded them: becauſe by undertaking to act for us under theſe re-

ſtrictions

ſtrictions, he has at leaſt tacitly obliged himſelf not to act otherwiſe.

Voluntary agent does not oblige.

XIX. "When we have appointed an agent to promiſe for us; the agent may happen to die, before he has tranſacted the buſineſs, and ſome other perſon, who knew, that he was our agent, and for what purpoſe, may poſſibly undertake to make the promiſe without our appointment, which he was to have made, if he had lived long enough to do it: in this caſe no obligation ariſes upon us from the act of ſuch perſon. For want of our appointment, that is, for want of our conſent to what he has done, it cannot be looked upon as our own act. If indeed our promiſe was contained in a letter, and the bearer, to whom we entruſted the letter, dies; but after his death this letter is delivered by ſome one elſe to the party, to whom the promiſe is made; the promiſe then becomes binding upon acceptance. The firſt bearer of the letter was not our agent; the letter is to promiſe for us, and is the inſtrument of our conſent: and it is not at all material whether the inſtrument, by which we deſigned to bind ourſelves, comes to the hands of the party, to whom we make the promiſe, by the hands of the firſt bearer, to whom we entruſted it, or by the hands of any one elſe.

What promiſes may and what may not be recalled, when they paſs through a third hand.

XX. Where a promiſe paſſes from the promiſer to the other party through a third hand, we ſhould conſider whether this third perſon was appointed merely as a meſſenger to notify the promiſe, or as an agent to make it. If he was only a meſſenger to notify the promiſe, and the promiſer recalls it before acceptance, but without acquainting his meſſenger, that he

" Grot. ibid. § XVII.

has done ſo; ſuch a revocation will have its effect: and though the meſſenger ſhould afterwards notify the promiſe, and acceptance ſhould be made upon ſuch notification, the promiſer is not obliged to make the promiſe good. The obligation of ſuch a promiſe depends upon the will of the promiſer, and not upon the will of his meſſenger: he had not bound himſelf to the meſſenger, and much leſs to any one elſe, to continue in the ſame mind or to abide by any act, which his meſſenger ſhould do. This is the deciſion of Grotius upon the caſe. But he ſhould have added, that the promiſer, though he might have no opportunity of informing his meſſenger, that he had recalled his promiſe, ſhould take care to acquaint ſome others with his having done ſo: becauſe his revocation, if it did not appear, can be of no more account, than if it did not exiſt: and conſequently without this precaution he could not in juſtice claim to be releaſed.

But when the perſon, through whoſe hands the promiſe paſſes, was appointed to make it, as the promiſers agent; then notwithſtanding the promiſer ſhould recall it, before it is made, yet unleſs his agent is made acquainted with what he has done, and for want of ſuch notice makes the promiſe, it will be binding. The agents appointment continues, till he knows himſelf to be diſcharged; and the promiſer by that appointment had transferred his power of acting in the caſe from himſelf to his agent.

Grotius, when he is taking notice of this diſtinction, applys it, in paſſing, to the caſe of gifts. Where I have made an actual donation, and have ordered a meſſenger to notify this to the perſon, to whom I ſo alienate

alienate my property, in order for his acceptance; if I die before this notice is actually given, and he upon receiving the notice, accepts; though this is done after my death, the donation is valid. It was complete on my part before my death; the meſſenger was not to make the donation for me, but to notify, that I had made it: and as to the other partys acceptance, by which the transfer is completed; this may as well be done after my death as before it: ſince I am no way concerned in this act of acceptance, nor is any farther concurrence of mine neceſſary towards completing the transfer, than what I had given already. We ſhould however obſerve, that ſuch ā donation can only take place as a will does, where no acceptance is made before the teſtators death: it muſt be ſome poſitive law, which, by taking the thing given into its cuſtody, prevents it from becoming the property of the firſt occupant, between the givers death and the other partys acceptance. But if inſtead of making the donation myſelf, and ordering a meſſenger to notify what I have done, I appoint an agent to make it for me; then if I die, before it is made, the donation will be void; though my agent, not knowing of my death, ſhould make it afterwards. The donation in this caſe was not actually made before my death, but was only ordered to be made; and after my death, as I cannot act for myſelf, ſo neither can I act by any other perſon: the appointment of any other perſon to be my agent or to do my acts for me ceaſes with my life, as I am then no longer capable of doing any act.

But what is here ſaid relates only to actual donations, and not to promiſes of giving. Whatever may be the character of the perſon, through whoſe hands

ſuch promiſe is conveyed, whether he is a meſſenger ſent by me, or an agent commiſſioned to act for me; if I die before acceptance, no ſubſequent acceptance can affect my heirs: ſince the obligation of my promiſe, even after it is accepted, is only perſonal, and conſequently muſt ceaſe at my death. A promiſe does not alienate my property in the thing promiſed, or give the party, to whom I make the promiſe, any claim upon the thing: it only alienates a part of my liberty, and gives him a claim upon my perſon to do ſuch acts, as will alienate the thing hereafter.

Effects of acceptance by another either with or without commiſſion.

XXI. * As we bind ourſelves by promiſes, which another man, who is appointed to act for us, makes in our name; ſo likewiſe we may accept promiſes by our agent, and may acquire a right in virtue of a promiſe ſo accepted. But where a perſon, who happens to be preſent, when a promiſe is made, accepts for us, without having our commiſſion for ſo doing; ſome doubt may be raiſed concerning the effect of ſuch an acceptance. And it will be neceſſary in determining any doubts upon this head, to enquire whether the promiſe is made directly to the perſon, who is preſent, though it is made for our benefit; or whether the words of it ſhew, that it was made to us, who are abſent, and that the perſon, who is preſent at the time of making it, is only appealed to as a witneſs of what has paſſed. Thus a promiſe relating to Titius, who is abſent, may be made to Caius, who is preſent, under either of theſe forms.—I promiſe you, Caius, that I will give ſuch a thing, or do ſuch a ſervice to Titius.—or, I promiſe Titius to give him ſuch a

* Grot. ibib. § XVIII.

thing,

thing, or to do him ſuch a ſervice, and do you, Caius, take notice, that I have promiſed it.

In the former of theſe caſes, as the promiſe is made directly to Caius, though it is for the benefit of Titius, yet the acceptance of Caius binds the promiſer: becauſe the liberty, which he alienates by it, is alienated to Caius; and it is he, who acquires a right by this act over the promiſers perſon. It is therefore in his power to releaſe the promiſer, at any time before Titius has accepted it. But after his acceptance, it is out of the power of Caius to releaſe ſuch promiſer; becauſe by his propoſal of the affair to Titius, and by the acceptance, which follows upon it, his right over the perſon of the promiſer is conveyed to Titius. Suppoſe Titius ſhould refuſe the favour, this refuſal releaſes the promiſer, and he is no longer under the ſame obligation to Caius: becauſe, as the benefit ariſing from the promiſe was a benefit to be received by Titius, upon his refuſal to receive ſuch benefit, the matter of the promiſe becomes impoſſible.

In the other caſe, if the promiſer ſays, I engage to Titius, who is abſent, that I will give him ſuch a thing, or do him ſuch a ſervice, and do you, Caius, take notice, that I have ſo engaged; then upon ſuppoſition, that Caius has a general commiſſion to act for Titius, or a ſpecial commiſſion to act for this purpoſe, his acceptance will make the promiſe binding upon the promiſer. But if he has no ſuch commiſſion, and does not accept, then the promiſe will, notwithſtanding his atteſtation of it, be in the power of the promiſer, who may recall it, if he pleaſes, at any time before it is accepted by Titius. Only as he had pub-

liſhed the promiſe, it will be neceſſary for him to recall it publicly: otherwiſe, if the promiſe appears, but the revocation does not appear, the promiſe will ſtand good, and the revocation will be nothing, for a reaſon, which has been frequently mentioned, and need not be repeated. Or laſtly, ſuppoſe, that Caius, who is ſo called upon to atteſt a promiſe made to Titius, ſhould, though he has no commiſſion to act for him, accept the promiſe: then if the promiſer does not agree, that he ſhould accept it, his acceptance can have no effect; he is not appointed agent for Titius, and the promiſer will not tranſact with him, as if he had that character. But if the promiſer conſents, that he ſhould accept; then notwithſtanding he has no ſuch appointment, this caſe will be reduced to the ſame ſtate with the former caſe; the promiſe upon the acceptance of Caius will be binding, till it appears, whether Titius will accept or refuſe the intereſt, which he has in it: for it is the ſame thing, whether the promiſer engages to Caius for the benefit of Titius, or engages to Titius and allows Caius ſo far to ſtand in the place of Titius as to accept for him.

A mans heirs cannot accept a promiſe for him.

XXII. If a promiſe is made to a man, and he dies before acceptance, the acceptance of his heirs does not bind the promiſer. However the promiſer might propoſe to alienate a right over his perſon to the deceaſed, it does not follow, that he is willing to alienate the ſame right over his perſon to the heirs of the deceaſed. Nay we may go one ſtep farther: if a promiſe is made to a man, and is accepted by him, but is not performed before his death; his heirs have no claim to performance, unleſs they were expreſly included

cluded in it. If indeed it had been made to him and his heirs, his acceptance would be binding upon the promiſer for their intereſt, as well as for his own. But if they were not included in it, if it was made to him without mentioning them; though he had accepted, yet the right acquired by ſuch acceptance is merely perſonal, and dies with him.

This is too plane to be queſtioned in promiſes of doing. I have promiſed a man, who is candidate for a certain office, that I will give him my vote; he accepts my promiſe, but dies before the day of election; and his ſon offers himſelf as a candidate for the ſame office. No one would imagine, that my promiſe made to the father binds me to vote for the ſon.

Nor can any reaſon be given, why it ſhould be otherwiſe in promiſes of giving, why if I promiſe to give a man a ſum of money, and he accepts the favour of my promiſe, but dies before performance, his heir, unleſs he was expreſsly included in the promiſe, ſhould have any claim to the money. If indeed the money, inſtead of being promiſed, had been actually given, the benefit of the promiſe would have deſcended to the heir: but this is no reaſon, why, if the money had not been given, he ſhould have the ſame claim upon me, that the deceaſed ſhould have had. I intended to give to the deceaſed; it does not follow from thence, that I intended to give to his heirs: the benefit of my promiſe, if it had been performed, would indeed have deſcended to them; but this is accidental, and does not appear to have been in my intention, as they were not expreſsly mentioned in the promiſe. If I had actually performed my promiſe by giving the money, I could not

not upon his deceaſe have demanded it again of the heirs: becauſe by giving it, I had parted with all my claim to it, and the deceaſed had, before his death, acquired a right, not merely over my perſon by a promiſe, but in the thing itſelf by a transfer of it. He might therefore have diſpoſed of it by will, if he had pleaſed; or if he does not do this it will deſcend to his heirs in inteſtate ſucceſſion.

Promiſory notes for money lent do not come under this deſcription. The form of ſuch notes — I promiſe to pay; eſpecially if I add, for value received, — ſhews them to be more than mere promiſes; it ſhews that he, who gives ſuch notes, acknowledges, that ſomething was due to the perſon, to whom they are given: and conſequently inſtead of being gratuitous promiſes, they are evidences of a debt.

CHAP.

CHAP. XIII.

Of Contracts.

I. *What meant by contracts.* II. *Contracts are either of immediate or future performance.* III. *Contracts are either of partial or mutual benefit.* IV. *Contracts are either of giving or doing or both.* V. *No man by contract parts with more than he intended.* VI. *The nature and obligation of a loan of inconsumable goods.* VII. *Of a commission.* VIII. *Of a charge.* IX. *Contracts of mutual benefit either share the matter or make it common.* X. *Incapacity of either party to be obliged voids the contract.* XI. *What the equality required in contracts consists in.* XII. *Equality in the previous acts relates to knowledge and freedom.* XIII. *Equality in the principal act relates to knowledge of the price.* XIV. *Equality in the matter relates to faults in the goods or errors in the price unknown to either party.* XV. *Want of an equivalent how supplyed in auctions.* XVI. *Price of things or work, what it is and how varied.* XVII. *Fair price is the market price.* XVIII. *Extraordinary circumstances allow to exceed the market price.* XIX. *Advantages by the introduction of money.* XX. *Metals the most proper materials for money.* XXI. *Uses and rules of coining.* XXII. *Use of money varys the price of goods.* XXIII. *Buying and selling.* XXIV. *Letting and renting.* XXV. *Letting and hiring of labour.* XXVI. *Loan of consumable goods.* XXVII. *Interest for money upon what principles to be defended.* XXVIII. *Usury why forbidden by the mosaic law.* XXIX. *Question relating to a loan.* XXX. *Nature of insurance.* XXXI. *Mixed contracts.*

contracts. XXXII. *Gain and loſs how adjuſted in partnerſhips.* XXXIII. *Partnerſhips mixed with inſurance.* XXXIV. *Contract of one partys bearing the whole loſs without any ſhare in the gain.* XXXV. *Work and money how compared in partnerſhips.* XXXVI. *Contracts how diſſolved.* XXXVII. *Contracts of chance their nature and obligation.* XXXVIII. *Contracts with a man to do or give what we might claim are void.* XXXIX. *Contracts, void where the matter is unlawful.* XL. *Obligation how reſtored to void contracts.*

What meant by contracts.

I. IN the laſt chapter we have conſidered at large the nature of promiſes. Where by promiſes I mean ſuch acts, as lay an obligation on the party or parties concerned on one ſide, and convey a demand upon their perſon to the party or parties concerned on the other ſide. So that in promiſes, according to this deſcription of them, there is no mutual obligation of the parties on both ſides each to the other; there is only an obligation on one part, and a correſpondent right on the other part. [y] Such acts of mankind, as produce a mutual obligation, and conſequently a mutual claim on the parties concerned on both ſides, are contracts.

Contracts are either of immediate or future performance.

II. Contracts are either ſuch as are performed immediately, or ſuch as we engage to perform at ſome future time. Thoſe of immediate performance I ſhall call ſimply contracts, and thoſe, which we bind ourſelves to perform at ſome future time, may be called promiſory contracts.

From this deſcription of promiſory contracts it will appear, that we need not conſider them particularly: for the queſtions, which ariſe upon them, are either

[y] Grotius Lib. II. Ch. XII. § VII.

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what may be determined from the rules relating to contracts in general, or from thoſe, which have been laid down relating to promiſes.

III. A ſecond diviſion of contracts is into ſuch as are of mutual, and ſuch as are of partial benefit. All contracts indeed ſuppoſe a mutual obligation of the parties engaged in them; but we ſhall find preſently, that they do not all produce a mutual benefit.

Contracts are either of partial or of mutual benefit.

IV. A third diviſion of contracts is into [a] contracts of giving, or contracts of doing, or contracts both of giving and of doing. For all the benefit ariſing from contracts, whether it is partial or mutual, muſt ariſe either from things, or from actions, or from both. Only it is to be obſerved, that under the notion of things we here include not only goods, but money likewiſe, and the uſe of either goods or money.

Contracts are either of giving or doing, or of both.

V. The fundamental rule in all contracts is, that no man by engaging in them parts with more than he deſigned to part with; or that the demand of one party cannot exceed what was in the intention of the other party to transfer or give up to him.

No man by contract parts with more than he intended.

By the deſign or intention of either party is not here meant any ſecret or reſerved deſign or intention, which he kept in his mind, and never diſcovered. Such a deſign or intention, as does not appear, is in caſes of contracts, as in all other caſes, of no more account, than a deſign or intention, which does not exiſt. But by the deſign or intention of either party is meant ſuch deſign or intention, as may be fairly collected either from his words or his actions. In the intercourſe of mankind one with another, no perſon can be ſuppoſed to deſign

[a] Grotius ibid. § II. [a] Grotius ibid.

or

or intend what does not appear in one of these ways because there is no evidence and can be no knowledg of his designing or intending any thing else, but wh does so appear.

There is a plane reason, why no persons grant o one side, and consequently no persons just demand o the other side, as far as such grant is made or such de mand arises from any contract, can ever extend beyon the design or intention of the person, who makes th grant. If it was otherwise, he might lose a part of hi property, or might be constrained to the doing certai actions, without his own consent. But as all causele harm done to a man, either in his property or in his li berty, is injustice; and the taking from him his proper ty or the constraining him to act in a certain manner without his own consent, is doing him causeless harm in these respects; it follows, that there can be no ju demand either upon his goods or his person, any far ther than he appears, or may be fairly shewn, to hav had a design or intention of granting such demand.

The nature and obligations of a loan of inconsumable goods.

VI. We will first consider contracts of partial bene fit, which may likewise be called gratuitous contracts because there is a favour done on one side, and no re turn of benefit arises from such contracts.

[b] If one man makes over his goods absolutely to an other, without reserving to himself any claim upon th goods, or upon the party, to whom he makes them over; this is a gift, and does not come within our de scription of contracts; no mutual obligation arises from such an act as this. In like manner, if we find, tha any person has occasion for our assistance, and we do him the service, which he wants, this is no contract

[b] Grot. ibid.

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provided no mutual obligation of juſtice ariſes from ſuch ſervice. But where our goods are ſuch as will not periſh or be conſumed in uſing, we have it in our power to diſpoſe of the uſe of thoſe goods, without alienating the property, which we have in them: we may let a man have the uſe of our houſe, or land, or horſes, or books, and ſtill keep our claim to the things themſelves. When this is done, without taking any valuable conſideration of the perſon, to whom we ſo make over the uſe, this is called a loan; and the act of our lending and his borrowing is a gratuitous contract. The act is planely gratuitous; becauſe he has a benefit from the uſe of our goods, and we receive no benefit in return: and it is a contract; becauſe a mutual obligation upon the lender and upon the borrower ariſes from it.

The principal obligation on the part of the lender is to take nothing for the uſe of his goods. This is all, which is contained in the general notion of a loan: neither the words nor the actions of a man, who ſays, that he will lend another his houſe, or his land, or his books, or his horſes, or any thing elſe, which may be uſed without being conſumed, and who does lend them accordingly, imply any more than this.

There may indeed be ſome other accidental obligations upon the lender: but they are ſuch as are not included in the general notion of a loan, and can take place no otherwiſe, than by having been particularly ſpecifyed. Thus he may, for inſtance, have expreſſed particularly for what determinate time he made over the uſe of his goods: if he has done this, he is obliged not to call for them, and has no right to demand them, till that time is expired.

The

The principal obligation on the part of the borrowe is to return the goods in the ſame condition, that he re ceived them: except only as far as they muſt have bee neceſſarily impared by time or by the uſe, which wa granted to him. He is obliged to return the good again; becauſe the lender did not deſign to transfer th property of them to him: and by the general rule o all contracts, the borrower can demand no more tha the lender deſigned to grant. If no time was fixed at firſ for returning the goods, it cannot be collected for wha time the lender deſigned to part with the uſe o them: it muſt therefore depend upon his pleaſure ho long the borrower ſhall uſe them. But if any tim was fixed, when the goods were lent; the owner the agreed to let the borrower uſe them ſo long. How ever therefore the lender may want them in the mea while, the borrower can only be charged with ingrati tude, if he refuſes to return them. He certainly can not be charged with injuſtice, in keeping the uſe of th goods for as long a time as the other had given him right to keep them. When the borrower returns th goods, he is obliged to return them in the ſame condi tion, in which he received them: becauſe otherwiſe h would take more than the lender deſigned to give him The lender intended to grant only the uſe of his goods but he loſes more than this by the borrower, if his good are returned to him in worſe condition, than when the went out of his hands.

We ought however to conſider, whether the damage which the goods have received, is ſuch, as they would have ſuffered, though they had continued in the owner hands, or whether it is ſuch, as they have ſuffered through ſome fault of the borrower. In the latter caſe he

he is obliged to make good the damage, for the reaſon already aſſigned. But in the former caſe, as for inſtance ſuppoſe the houſe to be burnt, or the land to be waſhed away by the ſea, or the horſes to die of ſome common diſtemper, the lender muſt in juſtice bear the loſs: becauſe if the borrower was to ſtand to all ſuch hazards, and to make good all accidents, which happen without his fault, and would have happened, though the thing had continued in the hands of the lender; there would ariſe from the contract a mutual benefit to the lender; which is contrary to the nature of a loan. There is indeed no injuſtice in bargaining with a man, that he ſhall enſure our goods from caſualties for the uſe of them: and if he agrees to this, he will be obliged to ſtand to all damages, as well thoſe, which happen without his fault, as thoſe, which happen with it. But then this contract is not a loan: ſuch conditions as theſe are not implyed in the act of lending; and if we would claim to have them obſerved, we muſt take care particularly to ſpecify them.

The nature and obligation of a commiſſion.

VII. If a man undertakes to do buſineſs for me, without any pay or reward; his propoſal of this ſort and my acceptance of it is a gratuitous contract, the general name of which is a commiſſion. If the ſervice, which he undertakes to do me, conſiſts in taking the cuſtody of my goods; this particular ſort of commiſſion is called a charge.

In a commiſſion the obligation on his part, who undertakes it, is to tranſact the buſineſs without wages, or any other valuable conſideration, and to uſe the ſame care and diligence in it, as if it was his own. That he is to require no wages or reward for his work, is plane from the nature of this contract, which ſuppoſes him

to undertake the buſineſs gratuitouſly, that is, hav declared his deſign of giving his time and trouble t the perſon, for whom he undertakes it. The onl queſtion is what degree of diligence is required of him The degree mentioned above is the ſame, that h would make uſe of in his own buſineſs, where it i of the ſame importance with that, which he under takes for another man: and it cannot be ſhewn, tha the other has any right to claim a higher degree tha this. Every man is ſuppoſed to manage his own affair to the beſt of his abilities; as far as the matter in hand may deſerve or require ſuch management: and there can be no reaſonable demand, that he ſhould encreas his uſual care, when he is to manage the affairs o another. But though a higher degree of diligence is no required, yet a lower degree would ſcarce be ſufficient It is better for us to pay for having our buſineſs wel done, than to have it managed careleſly for nothing Whenever therefore we entruſt any perſon with a com miſſion, we muſt reaſonably be ſuppoſed to have ſome ground for believing, that our affairs, when put into his hands, will be well managed: and the moſt ob vious ground, for believing this, is what we have ob ſerved ourſelves, or have heard well atteſted by others, concerning his management of his own affairs. Since therefore his prudent management of his own affairs, as far as our obſervation or intelligence reaches, is the ground of our truſting him; we ſhew by the very act of truſting him, that we expect he will manage as care fully for us, as he is uſed to do for himſelf. And if this is our intention, which is made to appear by our act of truſting him; then he, by undertaking the truſt, tacitly engages for this degree of diligence.

However,

However, unleſs there is notorious miſmanagement, his kindneſs entitles him to our favour: it is not reaſonable that any man ſhould be a loſer by his kindneſs in undertaking to give us his time and trouble in doing our buſineſs for us; and upon this account it is equitable to preſume in all doubtful caſes, that the damages, which we may ſuffer in ſuch of our affairs, as are in his hands, have not been owing, to any indiſcretion or neglect in him.

The obligation on our part, when ſuch a commiſſion is undertaken for our benefit, is to repay any expences, which he, who undertook it, may be at, and to make good any loſs, which he may ſuſtain in his own affairs, upon account of his having engaged in the management of ours. By engaging to give us his trouble it appears indeed, that he intended to give us thus much; but it does not appear, that he intended to give us more. Therefore by the general rule of all contracts, no more than this is due to us: and whatever he loſes more than this, by our means or upon our account, he has a right to demand of us.

A guardian or executor of a will is engaged in a contract of this ſort; where he undertakes the truſt without being paid for it, or, which amounts to the ſame thing, where he receives a ſmall acknowledgment, that does not by any means anſwer his trouble, nor was intended as a ſufficient payment. The ward or the heir is not the other party concerned in this contract with the guardian or executor: for he does not undertake the truſt at their requeſt or by their appointment. The other party is the teſtator, who requeſts and appoints him to be guardian or executor. This appointment was made by the teſtator before his death,

and the contract is completed afterwards by the acceptance of the executor or guardian. Here then it may be aſked, ſince the ward or the heir is not a party in the contract, how comes the guardians or executors demand for ſuch expences, as he makes, or for ſuch loſſes, as he meets with, to be upon the ward or heir? The reaſon is, that the guardian or executor, being entruſted with the management and diſpoſal of the teſtators goods, has a demand for his expences or loſſes, not upon the perſon of the teſtator, but upon thoſe goods, with which he is ſo entruſted; and by this means the demand will terminate in the ward or heir, who receives the goods chargeable with ſuch demand.

In inteſtate ſucceſſions, where the heir is an infant, whoever voluntarily undertakes the management of his affairs, has a like demand. Such inheritances, are indeed introduced by poſitive laws, and the laws, which introduce thoſe inheritances, commonly take care to provide both for the benefit of the heir and the ſecurity of the guardian. But the claim of a guardian will appear ſtill ſtronger, if we were to conſider this caſe, as it would ſtand by the law of nature. The guardian then would have a right to the goods as the firſt occupant: and if out of mere bounty he ſhould afterwards give them up to any relation of the inteſtate perſon, there could be no queſtion of his having a right to ſuch a part of the goods, as would repay him what expences he had made, and would ſatisfy him for what loſſes he had ſuſtained, by taking the cuſtody of the whole, till the inteſtates relation was capable of receiving them.

The nature and obligations of a charge.

VIII. From this account of the obligations, which ariſe from the general notion of a commiſſion, we may eaſily

eaſily underſtand what are the obligations attending that particular ſort of commiſſion, which is called a charge. If I undertake the charge of another mans goods, to keep them ſafe for him; I engage for nothing but my own diligence and fidelity. Whatever expences therefore I may be at, merely upon this account, he is obliged to repay me. In the mean time I am obliged to uſe the ſame diligence in keeping and ſecuring his goods, that I would make uſe of in keeping and ſecuring goods of the ſame value, if they were my own.

Upon this principle it will ſometimes happen, that I ought to preſerve his goods, rather than my own; not becauſe a greater degree of diligence is due to him than to myſelf; but becauſe his goods may be of more value than any, which belong to me; and I am to uſe the ſame diligence in preſerving his goods, that I would uſe in preſerving my own, if they were of equal value. Thus if I have a cheſt of gold or of deeds belonging to another man in my cuſtody; I might be obliged, in caſe of fire, to ſecure thoſe treaſures, rather than any of my own common furniture.

On the other hand; if attempts have been made to break open my houſe, whilſt I have the treaſure of another man in my keeping, and I am therefore forced to hire a guard, not for the ſake of ſecuring my own common goods, which are not likely to have been the temptation; as this expence is undertaken upon his account, he is obliged to pay the wages of the guard.

There can be no queſtion, whether the nature of this contract allows me to make uſe of goods, which are thus depoſited in my hands, and which I undertook to ſecure. They were planely lodged in my hands for the

owners benefit, and not for mine: they were to be kept for him, and not to be uſed by me. Neither can I claim the uſe of them, in return for my trouble in keeping them: if I had deſigned ſuch a thing, I might have mentioned it at firſt; and then, if he had conſented to it, I might have claimed the uſe of ſuch goods ſo depoſited with me. But in the mere act of undertaking a charge, no ſuch claim is underſtood: the act in its own nature is beneficial to the owner of the goods only, and is gratuitous on my part; unleſs I have taken care to make any expreſs reſerve to the contrary.

Indeed where goods will not be at all the worſe for uſing, as for inſtance if I have a piece of plate in my cuſtody and only ſet it on my ſideboard for ornament; the owner might be thought too ſtrict, if he complained of me for making ſuch a uſe of his goods. However my charge has certainly given me no right to uſe his goods, even for ſuch purpoſes as theſe. And if by thus letting it be publicly known, that I have goods of value in my hands, the future cuſtody of them ſhould become more expenſive to me, than it otherwiſe would have been; I do not ſee with what juſtice I could require him to bear theſe extraordinary expences, which I have brought upon myſelf, by doing what I had no right to do.

Contracts of mutual benefit either ſhare the matter or make it common.

IX. [c] Contracts of mutual benefit are either ſimple or mixed. Simple contracts of this ſort are either ſuch as ſhare the matter of them between the contracting parties, or ſuch as make it common to the parties.

Such contracts, as ſhare the matter of mutual benefit between the parties concerned in them, may be diſtin-

[c] Grot. ibid. § III.

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guiſhed into three ſorts agreeable to the third general diviſion of contracts, which has been already taken notice of. The only ways of benefiting one another are either by giving things in exchange for things, or ſecondly by doing uſeful ſervices in return for uſeful ſervices, or laſtly by doing uſeful ſervices in exchange for things.

This diviſion of contracts will be better underſtood by applying it in ſome few inſtances. We will begin with bartering. This is a contract of the firſt ſort, in which goods are given on one part for goods given on the other part. The contract does not unite the goods into one common ſtock, but all the goods on each ſide being conſidered as the matter of the contract, it ſhares or divides this matter between the parties concerned in it. Bartering may be conſidered in two different views. This contract could not be very like buying and ſelling, before the invention of money. Goods might then indeed be exchanged for goods, as horſes for oxen, or ſheep for corn: but there could be no other way of comparing them with one another, no meaſure of the price of them on either ſide, but what was taken from the uſe which one party might have for the goods of the other. If one perſon had many ſheep but no grain, and another on the contrary had much grain but no ſheep; each of them would make his own want of the others goods the meaſure, by which to determine what quantity of his own he would be willing to give for what quantity of the others. But ſince the invention and uſe of money; bartering approaches ſo near to buying and ſelling, that there is ſcarce any difference between them: in the exchange of goods for goods, the goods on both ſides are valued in money, and are compared with one another by this

ſtanding meaſure. If a man exchanges ſheep for oxen or wool for wine; he does not determine how many ſheep he will give for an ox, or what weight of wool he will give for a hogſhead of wine, by conſidering how little he wants the ſheep or the wool, and how much he wants the ox or the wine: but he eſtimates the value of the goods on both ſides in money, which is the common ſtandard of price.

There is another contract of the ſame ſort, to which the name of exchange is appropriated, a contract of giving money for money. I do not mean, when money is given for a medal or ſome ſcarce coin, which is matter of curioſity; for this is buying and ſelling: but when current coin of one ſort is given for current coin of another ſort, as gold or ſilver coin for copper coin, or when current coin of any ſort is given in one place for current coin of any ſort to be paid in another place; as when I give a man a certain ſum of money at my own home, and he is to give me, or to pay for my uſe, a certain ſum of money in London or Paris.

Giving caſh for bills cannot be ſtrictly reduced to this head: becauſe he, who gives the caſh and takes the bill, gives ſomething more than the caſh: he gives his trouble in negotiating the bill, and runs ſome hazard, if the ſeveral parties concerned in the bill ſhould become inſolvent, whilſt it is in his hands. So that, if we conſider the bill as money, he for this money gives his own money and his work beſides, and does likewiſe in ſome ſort enſure the bill.

The contract is ſtill of the ſame ſort, when money is given for goods; and the name of this contract is buying and ſelling. The money and the goods are the matter of the contract; and the contract ſhares this

matter,

matter, or divides it, between the parties concerned, and gives each of them property in his particular ſhare.

Of the ſame ſort are thoſe contracts, in which the uſe of goods is given for the uſe of goods: as if, for inſtance, a perſon has the uſe of my houſe in town, and I, in exchange, have the uſe of his houſe in the country. The uſe of the houſes is the matter of the contract; and it is the buſineſs of the contract to ſhare this matter between the parties, and to adjuſt their reſpective claims upon it.

In like manner the uſe of goods may be given for money: This contract is ſtill of the ſame ſort, and is called letting or renting. Nor is it a different contract, when the uſe of goods is given for goods, as when I let my eſtate, and bargain to receive the rent of it in cattle, or wheat, or malt.

It is not poſſible to reckon up the ſeveral contracts, which ſhare the matter between the contracting parties, and fall under the ſecond head of contracts, whereby uſeful ſervices are exchanged for uſeful ſervices. They are as numberleſs as the actions are, by which one man can promote the pleaſure or profit of another. In general we may obſerve, that in all theſe contracts the work or ſervice on both ſides is the matter of the contract; and that the effect of the contract is to aſſign to each party the work, which he is to do, and to give the other a claim upon him to do it. Contracts therefore, which are purely of this ſort, ſo that things are in no reſpect any part of the matter of them, are mutual alienations of liberty: each party obliges himſelf to do ſome work for the benefit of the other, or each party gives the other a demand upon his perſon.

Under

Under the third head, where things are exchanged for beneficial ſervices; though the beneficial ſervices, which may be performed, are numberleſs, yet the things which are given for ſuch ſervices, muſt be goods either moveable or immoveable, or money, or the uſe either of goods or of money. The beneficial ſervices and the things to be given for them are the matter of ſuch contracts: and the effect of the contract is to aſſign each party his ſhare of this matter, or to ſettle what things one of the parties ſhall have a right to claim, and what ſervices in return the other ſhall be entitled to. When money is given by one party in conſideration of the other partys undertaking to preſerve his goods from accidents, it is called enſurance. When money is given for common or daily work it is called letting and hiring.

The ſecond ſort of contracts of mutual benefit are ſuch as make the matter common to the parties concerned in them, or give the contracting parties a common claim to it. The general name of all contracts of this ſort is partnerſhip: and the matter of them may be either things or actions or both. When two or more perſons join money, or goods, or labour, or all of theſe together, and agree to give each other a common claim upon ſuch joynt ſtock, this is a partnerſhip.

All wagers, or gaming of any ſort, come under the notion of partnerſhip. The ſtakes, that is, the money or goods laid down on each ſide, are a joynt ſtock, upon which the parties concerned in the wager or game have a common claim, till the wager is decided or the game is over. This partnerſhip was originally intended to be of no longer continuance: the parties agreed from the firſt, that ſome uncertain event ſhould

put

ut an end to it in ſuch a manner, that, when it ends, he ſtock, which was in common before, ſhall not be ivided, but ſhall become the ſole property of one of hem.

Lots indeed are made uſe of in other inſtances, where there is no partnerſhip, and no ſuch common tock: but then in theſe inſtances there is no contract. f a nation ſhould determine itſelf by lot in making choice of judges, in the aſſigning of provinces, or in he diſpoſal of any other offices, this is no contract; t is only the method, which the publick fixes upon or chuſing one out of many competitors, in order to void the ill will of thoſe, who are diſappointed: and he right, which the fortunate competitor has to his ffice, does not ariſe from any other contract, but the ppointment of the public.

X. Contracts are, in ſome reſpects, ſubject to the ame rules with promiſes: all the parties contracting muſt have the uſe of their underſtanding and of their will, or otherwiſe the contract will be void. I ſay all he parties muſt have theſe qualifications: becauſe, as a mutual obligation of the parties on both ſides is eſſential to contracts, where one of them is under any incapacity of obliging himſelf the other cannot be obliged. In what manner fear or error affects a contract will appear from taking a more particular view of the equality naturally required in all mutual contracts.

Incapacity of either party to be obliged voids a contract.

XI. [d] It has been ſhewn already, that neither of the parties in a contract can claim any right by virtue of it, which the other does not conſent to transfer to him. And it appears from the nature of contracts of

What the equality required in contracts conſiſts in.

[d] Grot. ibid. § VIII.

mutual

mutual benefit, that neither of the parties has, or can be ſuppoſed to have, any deſign or intention of transferring any right to the other without receiving an equivalent. From hence it follows, that, when either party has received more, than he has given an equivalent for, he has received what the other never deſigned or conſented ſhould be his: and conſequently, as he has no claim to what he has ſo received, the contract is either void or muſt be corrected, that ſo he, who has too little, may either have his own again, or elſe may have amends made to him.

It may indeed be ſaid, when I have bought goods, and have paid the money for them, that, by my act of parting with my money and taking the goods, I planely ſhewed my conſent to transfer my property in the money to the ſeller, upon condition of his transferring his property in the goods to me. But the anſwer to this is obvious: in buying and ſelling, it is well known, from the very nature of the contract, though our words may not expreſs ſo much, that neither the buyer nor the ſeller intend to give each other any thing, as matter of mere bounty, but only upon ſuppoſition of each receiving an equivalent for what he gives. If therefore I buy goods; I transfer the property in my money to the ſeller, upon ſuppoſition, that I receive an equivalent for what I ſo transfer, and not otherwiſe. So that if this ſuppoſition fails, if I do not receive an equivalent, the condition fails, upon which alone I conſented that the money ſhould be his. For this reaſon, though he may be in poſſeſſion of the money, he has no right to it: he can have no right to it, unleſs I conſented to give him ſuch right; and I never conſented to give him ſuch right, but under the condition juſt now mentioned. In like manner,

manner, if I hire a houſe or lands, that is, if I purchaſe the uſe of them; my intention, according to the nature of this contract, is, that I will give the owner nothing without receiving an equivalent for it. There is nothing of mere bounty in contracts of this ſort; each party deſigns to receive as much benefit, as he gives. Whatever rent therefore the owner of the houſe, or lands receives of me, I conſent to make it his, upon ſuppoſition that I receive the value of it in the uſe of his eſtate. If then this ſuppoſition fails, though he may have gotten poſſeſſion of my money, it is not his; becauſe it cannot be his without my conſent, and I conſented to make it his, only upon ſuppoſition of my receiving an equivalent, which I have not received. The ſame reaſoning may be applyed to other contracts. If I hire a mans work or ſervice; this is not matter of favour or bounty on either ſide. The nature of the contract ſhews therefore, that I deſign to receive an equivalent for the wages, which I am to give him: and conſequently that I conſent to make the wages his, or to give him property in my money, only upon this condition. Unleſs then I do receive an equivalent for my money, the condition fails, upon which alone I conſented to make it his: and upon that account he has no claim to the wages, for which we bargained.

Now in order as far as may be to ſecure an equivalent to each party, in contracts of mutual benefit; it is neceſſary, that they ſhould treat with one another upon an equal footing; and their thus treating upon an equal footing is what we call the equality required in contracts. This equality relates either to the acts or to the matter of the contract. The acts, in which equality is required, are either thoſe, which are previous to the contract, or the principal act of contracting.

XII.

Equality, in the previous acts, relates to knowledge and freedom.

XII. [a] Before the contract is entered upon, it previouſly requiſite, that each party ſhould be equal the other as to his knowledge, or that whatev faults one of them knows of, in the thing or the ſe vice, concerning which they are about to bargain, ſhould diſcover them to the other. For any fault the matter of the contract, which either party deſign edly concealed from the other, will make the contra void, by preventing the other from receiving equivalent.

You ſell me goods at a certain price, which wou indeed be the true price of the goods, provided the had no concealed faults, but you know that the have ſuch faults, and do not diſcover them. Th goods then are not worth the price which you ſ upon them: and as I deſigned to give you ſuch price for them, only upon ſuppoſition of their bein worth it; I transfer the property in the purchaſe money to you, only upon this ſuppoſition: and con ſequently, as this ſuppoſition is a condition of th transfer, there is no transfer at all, unleſs the ſuppo ſition is true; and if you keep the money, you kee what is not your own.

How far common practice in buying and ſelling ma have prejudiced you againſt this concluſion, I canno tell. However to ſhew you the reaſonableneſs of it, will apply it to a ſimilar inſtance in another ſort o contract. I hire you to do ſome particular work; you at the time of letting yourſelf, labour under ſom diſtemper or other infirmity, which you conceal fro me, ſo as to be diſabled by it from doing the wor for which I hire you. It will, I imagine be allowed that, as ſoon as I diſcover you to be diſabled, the bar

[a] Grot. ibid. § IX.

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gain will be void; that you have no claim to the wages, for which we bargained; and that, if I paid you them beforehand, you ought in juſtice to return them. What then is the reaſon why you have no claim to theſe wages? is not it becauſe your work is not worth what I ſuppoſed it to be worth, and conſequently in this contract I cannot receive my equivalent? If this concluſion is well grounded, when I purchaſe your work, what ſhould make it doubtful, when I purchaſe your goods? If you have impoſed upon me, by concealing their faults, and they are not worth what I give for them; you have then no more right to the purchaſe-money, than you would have had to your wages, if I had hired you for work, and by any concealed weakneſs you were diſabled from doing that work. You will ſay perhaps, that in letting out your ſervice, you bargain for ſo much work, and conſequently, that, if you cannot do the work, the bargain is void; becauſe you fail of performing your part of it. And I may reply, that in ſelling your goods for ſuch a price, as they would have been worth, if they had been free from the concealed faults, you bargain for goods of ſuch a value, and conſequently, that if the concealed faults make them of leſs value, the bargain is void, becauſe you fail of performing your part of it.

When the parties are equal as to their knowledge of the faults, either of goods to be purchaſed, or of the uſe of goods, or of beneficial ſervices to be hired; and the purchaſer or hirer is willing, notwithſtanding what he knows about the matter of the contract, to enter upon a bargain; theſe faults, which are ſo known, cannot afterwards be a ſufficient reaſon for ſetting the bargain aſide.

We

We have hitherto ſuppoſed the inequality, as knowledge, to be on the ſide of the purchaſer or hir and have ſhewn by what means ſuch inequality w make the contract void. But it is to be remember that a like inequality on the ſide of the ſeller or lett will have the ſame effect, for the ſame reaſons.

If I know of advantages or perfections in a ma goods, which he is ignorant of, and when I am abo to bargain with him for thoſe goods, or for the uſe them, conceal from him what I know of the matte and ſo give him leſs for what I purchaſe of him th the thing is worth; I have no more right to the thi ſo purchaſed, than he in the oppoſite circumſtanc would have had to my money.

As it is requiſite previouſly to the contract, that t parties ſhould be equal as to their knowledge of t faults or excellencies of the thing, about which they a going to bargain; ſo it is likewiſe requiſite, that th ſhould be ſo far equal as to their freedom of choic that neither of them ought to make uſe of any unju threatenings to force the other, through fear, to contra or bargain with him. In ſuch an inequality as this t party by an act of injuſtice hinders the other from r ceiving his equivalent: and no act of injuſtice can gi him a right to the difference.

If the fear of one party was juſt, or if, though was unjuſt, it aroſe from ſome other quarter, and wa not at all owing to the party, with whom h bargains, I ſhould then determine otherwiſe. Becauſ though the perſon, who is in ſuch fear, does not r ceive his equivalent in the ſpecial matter of the con tract, ſuch as the goods purchaſed, or the work hired yet he receives the difference in being relieved fro

his fears: and as there is no injuſtice, on the part of him, from whom ſuch relief comes, there is nothing to hinder him from claiming the difference.

Equality in the principal act relates to knowledge of the price.

XIII. [f] In the principal act, which is the very act of bargaining, it is requiſite that the parties ſhould again be equal in their knowledge, as to the true price of the goods, or the uſe, or the ſervice, about which they are bargaining; ſo that the purchaſer may not impoſe on the ſeller, by under-rating the thing to be diſpoſed of, nor the ſeller, on the other hand, impoſe on the purchaſer, by ſetting too high a price upon it. If the ſeller, by being better informed about the true price of the thing, than the purchaſer is, ſhould obtain more for it, than it is worth; or if on the other hand, for want of this equality in knowledge, the purchaſer ſhould give him too little; in either caſe one of them has not received his equivalent: and this want of an equivalent on either ſide is ſufficient to make the contract void, for the reaſon ſo often alledged already: the party, who has received too little, intended to transfer his right in the thing, which he is diſpoſing of, only upon ſuppoſition of receiving what is of equal value; his right in it therefore being transferred upon this ſuppoſition, and not otherwiſe, the party, who has not given him an equivalent, has gained no right by the bargain.

That a knowledge of the intrinſic faults or excellencies, in the matter of a contract, is different from a knowledge of the true price; or that what Grotius calls equality in the acts previous to the bargain, is different from what he calls equality in the principal act of bargaining, will appear preſently, when we come

[f] Grot ibid. § IX.

to conſider by what means the price of goods or labour is varyed, and to ſhew, that though the particular intrinſic faults or excellencies of the matter may and do make a difference in the price; yet there are many other cauſes, which will vary it, where thoſe faults or excellencies are out of the queſtion.

Grotius, when he is treating about the equality required in contracts, propoſes to examine a queſtion, which Cicero has ſtarted, concerning a merchant, who had tranſported corn from Alexandria to Rhodes, at a time when the Rhodians were in great want of it, and corn ſold very dear at their markets. The merchant is ſuppoſed to know, at the ſame time, that a large fleet of merchant-ſhips laden with corn, were actually in their way from the ſame port, and deſtined for Rhodes. And the queſtion is, whether, as the knowledge of this circumſtance would have made the markets fall, he was obliged to diſcover it to the Rhodians, or whether he might take the advantage of their ignorance, and ſell his own corn at a better price, than it would have brought, if they had known, that ſo large a ſupply was near at hand. Grotius determines, that, whatever kindneſs or benevolence might ſuggeſt to him, he might conſiſtently with juſtice conceal this circumſtance: becauſe though the ſeller is obliged to diſcover all the faults, which he knew of, and the buyer did not know of in the goods themſelves, yet there is not the ſame obligation upon him to diſcover all the accidental circumſtances relating to them. But it ſeems very difficult to find out the difference between theſe two ſorts of concealment: there appears to be the ſame want of an equivalent on the ſide of the buyer, when the ſeller takes more of him

than

than the goods are worth, whether this advantage is made by concealing any intrinſic fault in the goods themſelves, or by concealing any accidental circumſtances, which would leſſen the value of them to the buyer.

In fact, if Grotius had examined this queſtion under its proper head, he would have determined otherwiſe upon it, than he has done. He examined it, when he was conſidering the requiſite equality in the knowledge of the contracting parties, in thoſe acts, which go before the contract: and as this equality reſpects only the intrinſic faults of the goods themſelves, it certainly does not include an equality in their knowledge of any accidental circumſtances. But the proper place for examining this queſtion is, when we are conſidering the equality of knowledge, which is required in the principal act, or in reſpect of the true price of the goods. For if it is neceſſary, that the price ſhould be a fair one; it is neceſſary likewiſe, that each party, in order to judge whether it is a fair one or not, ſhould be equally informed about all the accidental circumſtances, upon which the true price of the goods depends. And if the merchant aſked as high a price, when he knew of the ſupply, that was coming, as he would have aſked, if there had been no ſuch ſupply near at hand, he knowingly aſked more than, in thoſe circumſtances, his goods were worth, and more than the purchaſers would have given him, if they had known as much as he did. The purchaſers therefore, if they gave him his price, did not receive their equivalent; and this is inconſiſtent with the nature of all contracts of mutual benefit.

Equality in the matter relates to faults in the goods; or errors in the price unknown to either party.

XIV. [g] But ſuppoſe the buyer and the ſeller to have dealt fairly with one another, both in the previous and in the principal acts, ſuppoſe them to have been ſo far equal in their knowledge, as that neither of them has concealed any intrinſic faults, which he knew of in the goods, nor has deſignedly rated them either too high or too low; yet ſtill there may be an inequality in the matter of the contract; there might be faults in it, which neither of them knew of, or they might either of them ſet a falſe price without deſigning it. By this means one of the parties will not receive his equivalent: and as he parted with his own right in the money or goods, and transferred it to the other, only upon ſuppoſition of receiving an equivalent; upon failure of this ſuppoſition nothing is done; he has parted with no right, and conſequently the other has gained none by the bargain.

Want of an equivalent how ſupplyed in auctions.

XV. There are indeed ſome ways of buying and ſelling, as by auction or inch of candle, in which the want of an equivalent on either ſide will not affect the contract. But then this want is provided againſt by a tacit agreement of the parties beforehand. He, who puts his goods up to auction, ſignifys by ſo doing, that he will get as much for them as he can; whilſt they, who bid for the goods, tacitly conſent to his propoſal. And though, in ſome particular bargains, he may perhaps receive too much; yet it is ſuppoſed, that upon the whole this inequality will be made up: becauſe as his intention is to get as great a price, as he can; ſo he is underſtood to ſignify at the ſame time, that he will be ſatisfyed with as little, as the purchaſers chuſe to give.

[g] Grotius ibid. § XI.

XVI.

XVI. [h] As one part of the equality required in contracts relates to the ſetting a fair price upon the things or the work, that are to be diſpoſed of by them; it may not be improper, before we go on to the farther conſideration of contracts, to ſay ſomething concerning the notion of price, and the variations of it.

Price of things or work, what it is, and how varyed.

The price of things is their comparative value in reſpect of one another.

The wants of mankind, either real or imaginary, are the foundation of the price both of things and of labour. Such things, as no perſon either really wants, or fancies himſelf to want, will have no value at all, and conſequently can have no relative value in compariſon with other things.

Now ſince the want, that mankind have of a thing, is the true cauſe of its having any price at all; the price of things muſt neceſſarily vary as the want of them varys: in proportion as mankind want them more or leſs, their price, that is, their comparative value in reſpect of one another, will be greater or ſmaller. We will firſt conſider how the price of things varys, where mankind are in real want of them. Things are more or leſs wanted in proportion as they are more or leſs uſeful. Upon this account, if all other circumſtances are equal, things, which are the moſt uſeful, will bear the higheſt price, and things, which are the leaſt uſeful, will bear the loweſt.

But then our want of ſuch things, as are of real uſe to us, does not riſe or fall in proportion to their uſefulneſs only, but in proportion likewiſe to the difficulty of obtaining them. For where two things are equally uſeful, or equally neceſſary, ſo that in this reſpect our

[h] Grot. ibid. § XIV.

wants of them both are equal; yet in another reſpect our wants of them will be greater or leſs in proportion to the difficulty or eaſe of obtaining them: becauſe, where the uſefulneſs of a thing is given, our want of it will be greater or ſmaller in proportion as we feel that want more or leſs: and thoſe wants are felt the moſt, which are of the longeſt continuance, and thoſe are felt the leaſt, which are of the ſhorteſt. But ſince that want, which is the moſt difficult to ſupply, will commonly continue the longeſt, and will therefore be felt the moſt, it is upon this account the greateſt; whilſt another want, which may in itſelf be equal to the former, but is the moſt eaſy to ſupply, will commonly paſs off the ſooneſt, and being therefore felt the leaſt, will for this reaſon be the ſmalleſt. But the comparative value or price of things riſes or falls in proportion as our wants of them are greater or leſs. Therefore where things are equally uſeful, thoſe, which are moſt difficult to be procured, will bear a higher price, than thoſe, which may be procured more eaſily.

The difficulty or eaſe of procuring a thing depends upon two circumſtances; firſt upon the ſcarcity or plenty of the thing itſelf, and ſecondly upon the greater or ſmaller number of perſons, who want it at the ſame time. In a certain number of purchaſers, if there is great plenty of a thing, it is eaſily procured, and this will make it cheaper; if there is not much of it, we ſhall find ſome difficulty in procuring it, and this will make it dearer. Where only a certain quantity of a thing is to be had, there will be more difficulty in procuring as much of it as we want, when a great number want it at the ſame time; and this will raiſe the price of it: if there are fewer, who want it at the

ſame

ſame time, thoſe, who want it, may be more eaſily ſupplyed, and this will bring the price of it down lower.

Upon the whole then, the want of a thing is the foundation of its price; and conſequently the price will vary as the want varys. But either the want, or the price in conſequence of the want, will depend partly upon the uſefulneſs of the thing, and partly upon the difficulty of procuring it; and this difficulty depends partly upon the quantity of the thing, and partly upon the number of purchaſers, or, which amounts to the ſame, upon the demand that there is for it.

What has been ſaid of the price of things, may be applyed to the price of labour; in order to ſhew, that the comparative value, which is founded in the want, that we have for it, will depend ultimately upon the uſefulneſs of ſuch labour, upon the number of hands, that may be procured, and upon the demand, that there is for it. In proportion as the uſe of it is greater, as there are fewer hands to be procured, or a greater demand for what hands are to be gotten, the price of it will be higher: and ſo, on the contrary, in oppoſite circumſtances the price will be lower.

In the purchaſe of goods, which have been manufactured, the price depends partly upon the price of the materials, out of which they are made, and partly upon the price of that labour or work, by which they are manufactured. But here again it is the want of ſuch goods, and conſequently of ſuch materials, and ſuch workmanſhip, that is the original foundation of their price; and in what manner this want will vary their price has been ſeen already.

Under the head of real wants we include what is neceſſary for the ſupport and common convenience of mans life, according to the rank or ſtation, in which each perſon is placed; as food, cloathing, a dwelling, bedding, education, medicines, &c. But there are other wants, which we may call ordinary ones: and under this head we include whatever may adminiſter to a mans needleſs, but innocent, pleaſure or entertainment; as paintings, ſtatues, plate, jewels, &c. Theſe wants being preſuppoſed, the price of ſuch things as will ſupply them, or of the labour, which muſt be employed about thoſe things, is varyed in the ſame manner and in the ſame proportion with the price of ſuch things, as are neceſſary to ſupply our real wants, and of ſuch labour as is of real uſe. Things of this ſort will be dearer, as the taſte for them runs higher, that is, as their ſuppoſed uſefulneſs is greater; or as they are more difficult to be procured; that is, as the want of them is more felt: and the difficulty of procuring them will be greater, as the quantity of them, which can be had is leſs, or as there are more perſons, who want them at the ſame time.

Grotius amongſt other circumſtances, which encreaſe the price of things, reckons the trouble or expence of the merchant, who procures them; for which, he ſays, allowance is to be made in the price of the goods ſo procured. But theſe two circumſtances are not diſtinct from what have been mentioned already, and may eaſily be reſolved into one or other of them. If the merchant is at any expence, beſides paying wages to thoſe, who are employed in procuring them, which wages are the price of labour; ſuch expence is a part of the original purchaſe-money, which he paid for them. And to ſay

that

that allowance is to be made to him for expences of this ſort, is no more than ſaying, that as he buys dearer, he muſt ſell dearer. But what makes him buy dearer, unleſs it is either the uſefulneſs of the goods, or the difficulty of procuring them, which difficulty depends upon their ſcarcity, or upon the demand that there is for them? ſo that at laſt, if the price of his goods is high, it is for one of the reaſons already aſſigned.

Fair price is the market-price.

XVII. None of theſe particulars, upon which the price of things or of labour depends, can be reduced to any mathematical certainty. It is impoſſible to determine with exactneſs the comparative degree of their uſefulneſs, or of their ſcarcity, or of the demand, that there is for them. The price therefore neither of goods nor of labour can be ſo preciſely ſettled, as to allow of no latitude. No one can ſay, that this, or that, is ſo exactly what they are worth, that if the ſeller takes more, he takes too much; or if the buyer gives leſs, he gives too little. The general rule of price is what we call the market-price, by which we mean the price, that men, in that place, at that time, and in thoſe circumſtances, are commonly willing and have been uſed to give. But this is a very lax rule; and the price of things or of labour, when adjuſted by it, may well admit of theſe three degrees, the higheſt price, the loweſt price, and the moderate or middle price.

Civil laws indeed frequently interpoſe, and fix the price both of goods and of labour: and when their price is thus fixed, whatever exceeds that meaſure is too much, and whatever falls ſhort of it is too little.

XVIII.

Extraordinary circumſtances allow to exceed the market price.

XVIII. There are ſome extraordinary circumſtance which may reaſonably allow us to fix a higher pri upon our goods, than the market-price. But even the extraordinary circumſtances may be reduced to one the principles already mentioned, the uſefulneſs, und which I include the imaginary as well as the real uſe the ſcarcity, or the demand.

Theſe principles appear in numberleſs ſhapes; a in whatever ſhape they appear, they vary the price goods. You have goods, which you want to diſpo of, and which I have no occaſion for; but to oblig you, I am willing to buy them. It is plane then, bo that they are of no great uſe to you, becauſe yo deſire to part with them, and that they are of no gre uſe to me, by the ſuppoſition of my having no occ ſion for them. In this ſituation I expect to buy the at a lower price than ordinary: and the reaſon, why ſhould buy them ſo, is the ſmall uſe of them eith to the buyer or the ſeller.

You have goods, which are very uſeful to yo and which would likewiſe be particularly uſeful to m and you ſell me theſe goods merely to oblige me. The is, by the ſuppoſition, ſome extraordinary uſefuln of the goods both to the buyer and the ſeller; a upon this account you ſet an extraordinary price upo them.

You have an eſtate, which came to you from you anceſtors, and this circumſtance makes you fond of i the poſſeſſion of it gives you more pleaſure, than you had acquired it any other way. A particular fond neſs of this ſort is indeed but an imaginary uſefulne but it is ſuch an one, that, if I want to buy the eſtat you have no reaſon to part with it, unleſs I am willi

to give you a higher price, than you would have aſked otherwiſe, or than the eſtate would have been worth, between buyer and ſeller, if it had not been attended with this circumſtance.

If you could have made any particular advantage of your goods by keeping them yourſelf, or if you ſhall ſuffer any particular damage by parting with them; then, beſides the ordinary price, you expect to have this advantage or this damage made up to you; and upon this account you aſk an extraordinary price for your goods. Here again the price is raiſed by the particular uſefulneſs of the goods to you.

It is ſome loſs to you, if I delay the payment of the purchaſe-money, when I buy your goods: for till the payment is made you have no uſe of the money. Such delay of payment therefore is a reaſon for your ſelling your goods dearer, than if I had made prompt payment. Money paid ſometime hence is not ſo uſeful to you, as money paid juſt now would be: what therefore is wanting in the uſefulneſs of money ſo paid, muſt be made up in the quantity of it.

XIX. In bartering, where goods are to be compared immediately with goods; there is more difficulty in adjuſting the price, than in buying and ſelling with money: becauſe in ſuch bartering the value of the goods on both ſides is to be eſtimated. Whereas in buying and ſelling for money, the value of the money is already ſettled; and nothing is to be eſtimated but the comparative value of this ſtandard and the goods, which are to be purchaſed. My meaning is, that ſuch goods, as are not frequently exchanged for one another, will be uncertain in their price: but money, which is in conſtant commerce, and is exchanged

Advantages by the introduction of money.

ed every day for goods of all ſorts, will by ſuch uſ
have its comparative value ſo well ſettled, that we ma
without much difficulty, upon every occaſion, not on
ly determine how much goods we ought to receive i
exchange for how much money, but may apply it a
a common ſtandard or meaſure to compare the valu
of goods of one ſort with the value of goods o
another ſort. This we may reckon as one of the ad
vantages ariſing from the introduction of money: th
conſtant uſe of it in exchange makes it a ſtandard o
price, by which the comparative value of goods i
more readily adjuſted than it could have been other
wiſe.

A ſecond advantage ariſing from the introdu
ction of money is, that by the help of it we may com
monly procure ſuch things, as we want: whereas, i
all our riches conſiſted in goods; though we had grea
plenty of one ſort, we might want thoſe of anothe
ſort, without being able to get them in exchange.
might have great plenty of corn; but if I had occaſio
for ſheep or oxen, though you had plenty of them
you might not be willing to barter them for my corn
becauſe you might have more corn of your own al
ready, than you wanted. In the mean time you migh
have occaſion for wine, and would be glad to exchang
your ſheep or oxen for it, if I had any. But as I hav
none, I am forced to keep my own corn, and canno
procure for it what I want, and what, if I had an
goods, which would ſuit your convenience, you woul
ſupply me with: in the mean time you are ſubject t
the ſame inconvenience; if they, who have wine t
ſpare, have no occaſion for ſheep or oxen. This in
convenience is remedyed by the uſe of a curren
ſtandard

tandard, which all men are ready to take one of nother. Though you would not part with your ſheep r oxen for my corn, becauſe you do not want it; yet ou will readily part with them for my money, as you now, that they, who would not let you have wine or ſheep or oxen, will let you have it for this money, which they can paſs off again in the ſame manner, and procure in exchange for it ſuch things as they want.

A third advantage ariſing from the introduction of money is, that it lies in a little compaſs, and is therefore better fitted for commerce than bulky goods would be. I have great numbers of cattle, and ſhould be willing to exchange them, if I could, for wine: but no perſon near me has any to diſpoſe of; perhaps none is produced in the country where I live. If then I would have it, I muſt go from home for it: and it would be vaſt trouble, if indeed it was poſſible, to drive or convey my cattle to ſuch a diſtance. But money lies in a leſs compaſs, and is eaſily carryed from place to place: it will therefore make the exchange much eaſier to me. Though I could not convey my cattle ſo far, I can get money for them nearer home, and can eaſily convey the money to the place, where I want to make the purchaſe of wine.

As it is one advantage ariſing from the introduction of money, that a great value lies in a narrow compaſs; ſo we may reckon it a fourth advantage, that we can reduce it into parts, which are of ſmall value, much more readily than we can moſt ſorts of goods. I have more horſes, than I want, but have occaſion for a ſheep, which is worth much leſs, than any one of my horſes. I cannot therefore get what I want, but at a great diſadvantage: becauſe I have

nothing

nothing to give in exchange for it, but what vaſt exceeds it in value. The introduction of money h removed this inconvenience. Though I could n divide the horſe, ſo as to give no more, than the ſhe is worth; yet I can, when I have ſold him, divide t money, and procure what I want, without giving t much for it,

A fifth advantage ariſing from the introduction money is, that we may keep it more eaſily than could have kept moſt ſorts of moveable goods. Wh we have taken it in exchange, there is no danger of i waſting or periſhing in our hands, before we ſhall ha occaſion to part with it again. Cattle would die; fru would rot; corn, or wine would ſpoil: but mon may be kept for any length of time without being t worſe for it.

Metals the moſt proper materials for money.

XX. If the advantages, which I have been men tioning, were propoſed in the introduction of mone we may eaſily determine what materials are the mo proper to make it of. As it is deſigned to be t ſtandard of price, a common meaſure, by which compare the ſeveral values of other things with o another; the materials, of which it is made, ſhou be as ſteady, as poſſible, in their own value; the uſ fulneſs of them, their ſcarcity, and the demand for the ſhould be as little liable to variation, as may be.

Secondly; money is intended to be current among all thoſe, who have any intercourſe of commerce wi one another, ſo that any perſon will readily take it i exchange for ſuch goods, as he can ſpare; becauſe h knows beforehand, that others will take it in like man ner of him again: for this reaſon the materials, that is made of, ſhould be ſuch, as in the opinion of thoſe wh

who have ſuch intercourſe, have ſome uſefulneſs and conſequently ſome value, either real or imaginary. Paper or leather, or any thing elſe, which has no ſuch intrinſic value, either real or imaginary, will be current no farther, than the credit of the perſon goes, who vents them, and makes himſelf anſwerable to take them at any time in exchange: nor will they be current even ſo far, unleſs he makes himſelf anſwerable likewiſe to exchange them for what will be current with every body. Suppoſe a man to circulate bills, which were payable by him upon demand, but were to be paid when demanded, in corn, or in wool: thoſe bills would not be current, as far as his credit would go: all perſons, who might otherwiſe be ready to truſt him, would not be willing to take ſuch bills in exchange: no one indeed would take them, who might poſſibly not be able to exchange them with any body, beſides the firſt drawer of the bills: becauſe no one would care to be forced to take corn or wool, at a time when perhaps he may have no occaſion for any, or may not know how to diſpoſe of any, if he had it. If thoſe bills were payable in money by the drawer, then indeed ſuch bills will paſs with all perſons, who know they may depend upon his promiſe to take them again. Such is the neceſſity that the current exchange amongſt private perſons ſhould be carryed on with ſuch materials, as have in themſelves ſome real or imaginary value. The authority of civil government will reach ſomething farther; it will be able to circulate uſeleſs materials in common exchange, as far as its juriſdiction extends. The ſubjects of the ſame government, in their contracts with one another, may be forced by the laws, or where the government has the

right

right of coining, and will vent only baſe money, the may be forced, by the neceſſity of the caſe, to take ſuc money in the courſe of their common dealings. Bu then foreigners, who are not under the ſame juriſdi ction, nor under the ſame neceſſity, will not take thei money; becauſe it is worth nothing to them. Nor wi ſuch foreigners take bills upon the credit even of th government; unleſs thoſe bills are payable in ſuc materials, as are worth ſomething in themſelves, an ſuch too as they can circulate again upon account o ſome intrinſic value either real or imaginary.

Since a third advantage, propoſed by the uſe o money, is, that what will fetch many goods in ex change may lie in a narrow compaſs, the materials of which it is made, ſhould be ſuch, as have in them ſelves a high value, either upon account of their grea uſefulneſs, or their great ſcarcity. Such materials, a have both theſe qualities, would not be proper for th purpoſe. A ſufficient quantity of what is very uſeful if it is likewiſe very ſcarce, could not be ſpared from the common occaſions of life to be applyed to the ſol purpoſe of exchange: becauſe as much as is applyed to this purpoſe becomes uſeleſs to other purpoſes. An certainly ſuch materials, as have only the quality o great uſefulneſs, but are at the ſame time very plenti ful, will be of too ſmall value to anſwer this deſign o introducing money, which we are now ſpeaking of. The beſt materials therefore are ſuch as have little rea uſefulneſs in themſelves, and have their chief intrinſic value given them by ſome imaginary uſefulneſs only ſuch as mankind can do very well without, but ſuch as common opinion has made them deſirous of having. Materials of this ſort may be ſpared from the common

uſes

uſes of life to make money of. And if their value is raiſed very high, by the ſcarcity of them; ſuch a quantity of them, as will lie in a narrow compaſs, will fetch many goods in exchange.

A fourth advantage, deſigned by the introduction of money, is, that it may be reduced into ſuch ſmall parts, as to be exchanged without diſadvantage for things of ſmall value. It is proper therefore to uſe materials of different ſorts, ſome of greater ſome of leſſer value: becauſe as the laſt-mentioned uſe of money requires, that ſome ſhould be made out of very dear materials, though the ſame materials might be made into pieces ſome greater and ſome leſſer, yet the leſſer pieces would either be of too great value to be exchanged upon fair terms for cheap goods, or elſe they would be ſo ſmall as to be in danger of being loſt.

The fifth advantage prpoſed by the introduction of money is, that it will keep without waſting or ſpoiling; ſo that he, who takes it in exchange, is in no danger of having it periſh in his hands. And in view to this advantage it is planely requiſite, that money ſhould be made of ſuch materials, as will not eaſily wear out, and as are not ſubject to periſh or to be damaged by keeping.

[i] Metals, ſome of them at leaſt, as gold or ſilver, will anſwer moſt of theſe purpoſes. Their intrinſic uſefulneſs is not very great at any time; ſo that there is no danger of any ſuch variations in this uſefulneſs at different times, as will make their value uncertain; and the plenty or ſcarcity of them is at all times much the ſame, unleſs ſome very unlikely or unforeſeen accident, ſuch as the diſcovery of the weſt indies, ſhould make an alteration: and as the value of them is

[i] Grot. ibid. §XVII.

imaginary rather than real, the demand for them will commonly be much the ſame, But then this imaginary value being almoſt univerſal, they will be readily current every where in exchange for goods. And as it is high at the ſame time, a ſmall quantity of them will bear a great price, or what is worth much will lie in a narrow compaſs. As this high value ariſes from opinion and ſcarcity, rather than from any real uſefulneſs of them; what is wanted to carry on commerce may be made into money, without depriving mankind, in any degree, of what they want to uſe for the purpoſes of common life. And we may obſerve by the way, that if iron was as ſcarce as gold, it would not be ſo proper for the materials of money; notwithſtanding the very high value, which its known uſefulneſs and its ſuppoſed ſcarcity would give it: becauſe, if ſo little of it was to be had, by making money enough out of it to maintain a general commerce, more of it would be taken from the uſes of common life, than could be well ſpared. But gold and ſilver alone will not anſwer all the deſigns of introducing money: their value is rather too high: pieces of theſe metals, if they were ſmall enough to exchange, without diſadvantage, for ſmall quantities of cheap goods, would be in danger of being loſt: and upon this account it is neceſſary to make uſe of ſome baſer metal, ſuch as copper, for pieces of ſmaller value. Any metals may paſs from hand to hand without wearing out, and may be well enough kept, as long as we pleaſe, without being the worſe for it: but gold and ſilver are the beſt upon this account, as well as upon others; becauſe they are leſs hurt by keeping than the other metals are.

XXI

XXI. After mankind have been led by ſuch reaſons, as we have been mentioning, to fix upon metals, as the ſtandard of price, and the current matter of general exchange; it is plane, that without the aid of civil laws, the different value of this or that piece of any metal, as of gold for inſtance, can depend upon nothing but the different quantity contained in the ſame piece, or upon, what is the ſame in effect, the different weight of it. If a certain quantity of bullion is, in the courſe of exchange, worth two ſheep, any civil legiſlator may order, if he pleaſes, that all perſons under his juriſdiction, ſhall take the ſame quantity of metal, after it is coined, in exchange for ſix ſheep. But this rule will be of force no farther, than his juriſdiction extends: foreigners, who are free from his authority, will not regard ſuch a law, and will eſtimate his coin only by the weight of it. And as in coining there muſt be ſome allay or mixture of baſer metal, they will have a regard to this too, and will eſtimate a given weight of the mixed metal by its fineneſs; that is, by the true weight of pure gold in the coin. Uſes and rules of coining.

However, as there would be much trouble and much time loſt in weighing the metal every time it is exchanged, there is a great convenience in ſignifying by ſome ſtamp, upon every piece of metal deſigned for exchange, what the weight of that piece is. And this convenience gave occaſion to the coining of metals.

Indeed as there is ſome trouble and time ſaved to the trader by having every piece of metal, which he is to receive, ſo ſtamped; it is but reaſonable, that he ſhould make ſome allowance for this convenience. So that a piece of money, when coined, is worth ſome-

thing more, than the ſame quantity of bullion would be. This difference ought not to be greater, than what may anſwer the convenience of the trader: becauſe no one can be expected, or would be willing, in the courſe of exchange, to pay for more. An allowance for ſuch a difference as this is reaſonable on both ſides; the coiner expects it, that he may be paid for his trouble; and the receivers, one after another, are willing to pay it, upon account of the convenience already mentioned. The coiner may indeed uſe more art and labour, than is neceſſary for the purpoſe deſigned by coining; and if he does, he has no reaſon to expect, that the receiver will allow him for it. Some art and labour however is neceſſary: a plane ſimple ſtamp would not well anſwer the purpoſe. Care muſt be taken to make the ſtamp ſuch, as is not eaſily counterfeited: becauſe otherwiſe baſe metal, or metal under weight, might be made to paſs, as if it was pure and of due weight, by the help of ſuch a counterfeit ſtamp. And care muſt likewiſe be taken to ſtamp or mark it in ſuch a manner, that no part of the metal, after it is once ſtamped, can eaſily be taken away, without effacing the ſtamp, either in whole or in part, ſo as to diſcover the fraud. So much art and labour as this will be of uſe to the receivers; as the money paſſes from one hand to another: and therefore the coiner may expect to be paid for it. The value of this art and labour is what a piece of metal is worth, when it is coined into money, more than an equal weight of the ſame metal would be worth in bullion.

As the ſtamp is deſigned to aſcertain the weight of metal, and as money is deſigned to be the matter of general exchange; it is proper, that the buſineſs of coining

coining ſhould be in the hands of perſons of the moſt undoubted and of the moſt extenſive credit. The ſtamp of a perſon of doubtful character would not induce any one to take money ſo ſtamped without weighing it: and the ſtamp of a perſon of good credit, if he was not much known, would induce only the few, who did know him, to take it upon his authority. Upon this account money, that is coined by national authority, or by the government of each nation, will beſt anſwer the purpoſes deſigned by coining.

My ſubject led me to ſay ſomething concerning the price of goods and labour, and the grounds of its variation: and as this engaged me to enquire into the uſe and value of money, the reader will, I hope, excuſe me, if this digreſſion has been longer than he expected.

Uſe of money varies the price of goods.

XXII. The introduction of money occaſions another ſeeming variation in the price of goods, beſides thoſe, which we have taken notice of already. [k] Money, though it is uſed as the ſtandard of price, by which the different values of goods or of labour are compared with one another, is not wholly invariable in its own price; that is, in reſpect of goods or labour it has not always the ſame comparative value. There is not always the ſame quantity of money amongſt all mankind, who have an intercourſe of commerce with one another; and much leſs is there always the ſame quantity of it current in the ſame nation, or amongſt thoſe, who upon account of their nearneſs or other connections have the moſt frequent intercourſe of commerce. The ſcarcity of money raiſes its price, and the plenty of it ſinks its price; in the ſame manner as the ſcarcity or

[k] Grot. ibid. § XIV.

plenty of any thing elſe varys the comparative value of that thing. If when money is ſcarce, a ſmall quantity of it is equal, upon the compariſon, to a certain quantity of any ſort of goods or labour; a greater quantity of it, when it is plentiful, will only be equal in value to the ſame quantity of the ſame goods or labour. A quarter of wheat, which at one time is worth no more than two ſhillings, may at another time, in the ſame plenty of wheat, be worth forty ſhillings: not becauſe there is any alteration either in the intrinſic uſefulneſs of wheat, or in the comparative value of it with other goods, ſuch as ſheep, cloth, wine, &c; but becauſe the quantity of money is altered, ſo as to be twenty times more plentiful at one time than at the other; and upon account of this greater plenty twenty times any quantity of it, when compared with the ſame ſort of goods, will be worth no more, or will bring in exchange no more of thoſe goods, than the ſimple quantity was worth or would have brought in a greater ſcarcity. In caſes of this ſort we uſually ſay that wheat or any other ſort of goods is grown dearer; but the fact is, that money is grown cheaper. Only as money is looked upon to be the ſtandard of price and is therefore conſidered as invariable in its own price; goods or labour ſeem dearer or cheaper, in proportion as more or leſs money muſt be given for the ſame quantity of them.

Buying and ſelling.

XXIII. [1] Before we leave this ſubject of mutual contracts, it may be proper to ſay ſomething concerning ſome of the moſt uſual contracts of this ſort. Buying and ſelling is a very common and well-known contract. But the writers upon natural juriſprudence do not

[1] Grot. ibid. § XV.

ſeem

ſeem to have determined ſome of the queſtions ariſing upon it with ſufficient exactneſs. It may be aſked at what time the contract of buying and ſelling is complete? But before we can anſwer this queſtion, it will be neceſſary for thoſe, who aſk it, to explane what they mean by the bargains being complete. The bargain may be ſaid to be complete, either when the parties are bound, each to the other, to do what they have agreed upon; or when the property of the goods is actually transferred to the buyer, and the property of the money to the ſeller.

In the firſt ſenſe the bargain is complete, as ſoon as the parties have agreed upon the price: the ſeller has then agreed, that he will part with ſuch a quantity of goods for ſo much money; and the buyer has then agreed, that he will part with ſo much money for ſuch a quantity of goods. The buyer after this can juſtly force the ſeller to deliver up the goods, and the ſeller can juſtly force the buyer to take the goods and to pay down the money. But if the matter reſts here, it is only a promiſory contract; the bargain is not ſo far completed, as to have transferred what was the property of either party to the other. They agreed, that they would tranfer this or that; but they have not actually transferred it. The demand therefore is yet only upon the perſon, to force him to do what he had promiſed: there is no demand upon the thing, till the property is actually transferred. If then either the buyer or the ſeller was to die, before they had proceeded any farther, I do not ſee, that the ſurvivor would have any right over the goods or the money agreed for; nor conſequently, that he would have any right to force the heir of the deceaſed to ſtand to the bargain.

To complete the bargain ſo far, as to give each a right, not merely over the perſon, but in the things of the other; ſome acts or words are neceſſary denoting a mutual conſent of each to make an actual transfer of his property to the other. Such a transfer as this is ſufficiently expreſſed by the mutual delivery of the goods and money. Or it may be expreſſed only by the delivery either of the goods or of the money on one part, and the acceptance of what is ſo delivered on the other part: becauſe, as the ſeller, for inſtance, had agreed, that he would give the buyer property in ſuch or ſuch goods, in conſideration of ſo much money to be paid to himſelf; if the buyer pays the money, the ſeller, by accepting it, muſt be underſtood to do what he had before agreed that he would do, upon this conſideration. Delivery in part, or giving earneſt, has the ſame effect: it is deſigned on the buyers part to ſignify his will to make an actual transfer of his property in the money agreed upon; and the ſeller, by taking earneſt, is underſtood to give his actual conſent to what he had before agreed to do, in conſideration of receiving property in the purchaſe-money. In the purchaſe of immoveable goods, ſuch as houſes or lands, the ſeller, though he cannot deliver the whole thing purchaſed, may by a negative act ſignify his conſent to make an actual transfer of the property, which he had in ſuch goods. This negative act is his ſuffering the buyer, without interrupting him, to take poſſeſſion by ſettling in the houſe, or by cultivating the lands, or by ſetting either of them to ſome other perſon, and receiving the rents or profits. The thing purchaſed may indeed be delivered in part by a poſitive act; as in the ſale of lands by delivering a clod or a turf, and in the ſale of houſes

ouſes by delivering the key. The parties may like-
iſe tranfer their property each to the other, in
oveable or immoveable goods, or in money, by
ords either ſpoken or written; if inſtead of engaging
words of future time, that they will transfer, they
xpreſsly declare in words of preſent time, that they do
ansfer their property. Where ſuch words of preſent
me are made uſe of, the bargain does not reſt in a
romiſe; it does not merely give each a claim upon the
erſon of the other, but gives actual property in the
ing itſelf.

After the bargain of buying and ſelling is complete,
uppoſe the thing ſold to remain in the ſellers poſſeſ-
on, and whilſt it is ſo, to periſh, or to be any way
oſt or damaged; it is farther enquired, whether the
uyer or the ſeller is to bear the loſs? Here again we
e to conſider, what is meant by the bargains being
omplete, that is, we are to conſider what ſort of a
ergain it was, whether it was promiſory only, ſo that
virtue of it the parties had each of them a right
erely over the perſon of the other; or whether it was
ch a bargain, as made an actual transfer of property
om one to the other.

In the former caſe, where the bargain reſts in a mu-
al promiſe; the goods are ſtill the property of the
ller, and the money is ſtill the property of the buyer:
e ſeller therefore muſt bear the loſs or damage; be-
auſe naturally all the loſs or damage, which a thing
ſtains, falls upon the owner of it. The buyer agrees,
at he will give ſuch a ſum of money for a houſe or
r lands; but before the property is transferred, the
ouſe is burnt down, or the ſea waſhes away the lands:
e ſeller can then have no demand upon him for the
money:

money: the houſe and land were ſtill the property
the ſeller; and the loſs will naturally fall upon him.

If indeed, either by delivery in part, or by the plai
words of the contract, the property of the goods wa
transferred to the buyer, and before he has full poſſe
ſion of them, they periſh or are damaged; the loſs fal
upon him, as being the owner of the goods, and no
upon the ſeller, in whoſe hands they happen to be.

It is true, that if ſuch goods periſhed or were da
maged through the fault of the ſeller, then the buye
has a demand for an equivalent: but this demand ar
ſes from another principle to be explaned hereafter, an
not from the contract.

Theſe particulars may be otherwiſe ſettled betwee
the buyer and the ſeller by expreſs words. But it woul
be endleſs to reckon up all the exceptions, or cond
tions, which they may add to their bargain: all that w
can pretend to do is to ſhew what rights ariſe out
the mere contract, where nothing elſe is agreed upo
Only it is to be obſerved, that, where any expreſs co
ditions or exceptions are added by the conſent of t
parties, each of them is obliged, by his own conſen
to comply with ſuch conditions or exceptions.

If I ſell the ſame goods twice, it may be a queſtio
which of the two purchaſers has a right to the good
Here we are to enquire, what ſort of a bargain the fi
of the two was. If it was ſuch an one, as gave t
purchaſer property in the goods, the ſecond barga
will be void: becauſe, as the goods, at the time of th
ſecond bargain, were not mine, I had no right to di
poſe of them. But if the firſt bargain was promiſo
only, ſo as to give the purchaſer a perſonal demand u
on me, but no property in the goods; then the ſeco
barga

[1] Grot.

rgain, provided it was ſuch an one as gave property, ill be ſo far valid, that the ſecond purchaſer will have right to the goods: this ſecond bargain, though my rmer promiſe had made it unlawful, is not void; nce, by the ſuppoſition, the goods were ſtill mine, or had ſtill a right in them. In the mean time there is o reaſon for ſaying, that the validity of this ſecond rgain will make void the firſt: the claim of the rſt purchaſer will ſtill continue what is was, a demand upon my perſon to the value of the goods, pon his paying me the ſum of money, which we had greed upon.

Letting and renting.

XXIV. [1] Letting and renting is ſubject to nearly the me rules with buying and ſelling: for theſe two conracts are in all reſpects very like one another. The rincipal difference between them is, that in letting and nting the owner or landlord ſells, and the occupier or enant buys, the uſe of the thing: whereas in buying nd ſelling, the owner ſells, and the purchaſer buys, he property in it. The conſideration, which is paid or the property in one of theſe contracts, is called the rice: the conſideration, which is paid for the uſe in he other contract, is called the rent.

When a man has purchaſed the property of a thing, f the thing is loſt or damaged, he is to bear ſuch loſs r damage. Suppoſe therefore, inſtead of purchaſing he property of the thing, that he had only purchaſed he uſe of it; then if the uſe of the thing is loſt or damaged, the loſs or damage of the uſe ſeems naturally o fall upon him, who is the owner of the uſe; that is, pon the tenant; and not upon the landlord, who has arted with the uſe, though he is ſtill owner of the hing.

[1] Grot. ibid. § XVIII.

But

But this rule wants to be explaned, in order to ad
juſt the ſeveral claims of the owner and the hirer. Th
uſe of a thing may be leſſened two ways. It may b
leſſened, though the thing continues in the ſame con
dition, as when it was hired; or it may be leſſened b
ſome damage, which makes the thing worſe in itſel
than it was then.

All loſſes in the uſe of the thing, which are of th
firſt ſort, or which happen without any damage in th
thing itſelf, naturally fall upon the hirer. Theſe ar
loſſes in the uſe only, which uſe he has made his ow
by purchaſing it. Suppoſe I hire a ſhop, which is we
ſituated for trade, at the time of hiring it, and conſe
quently is worth a large rent: but before the time, fo
which I hired it, is expired, the courſe of trade alters
and my cuſtom becomes by that means much worſe
than might reaſonably have been expected, at the tim
when I firſt entered upon the ſhop. In this caſe th
uſe of the thing is damaged, without any damage i
the thing itſelf. Since therefore the thing is no worſe
the loſs cannot juſtly fall upon the owner of the thing
it is the uſe only of the thing, which is leſſened, an
this muſt naturally fall upon me, as the owner of th
uſe.

But if the uſe is leſſened by any damage, which th
thing itſelf has ſuſtained; the loſs will naturally fall up
on the owner of the thing: becauſe as the damage pri
marily affects the thing itſelf; there can be no juſt rea
ſon given, why any one elſe, in particular why th
owner of the uſe, ſhould bear the loſs, which happen
to the others property. This ſeems to be clear in thoſ
inſtances, where the damage done to the thing itſelf i
ſuch, as to deſtroy the very exiſtence of it. I hire

houſe

houſe, and before the time, for which I hired it, is expired, the houſe is burnt down. No one can imagine, that I am naturally obliged ſtill to pay the rent of it. I hire lands, and before the time, for which I hired them, is expired, the ſea waſhes them away. This event will naturally diſcharge me from the payment of rent. But ſuppoſe that the fire, inſtead of burning the houſe down, had made it ſo ruinous, as to be uninhabitable; or that the ſea, inſtead of waſhing away the lands, had overflowed them, and remained there, ſo that it could not be drained off again. There could be no more reaſon for my payment of rent, upon this ſuppoſition, than upon the former. Whatever damage affects the thing itſelf is naturally the loſs of the owner of the thing: but if the hirer was ſtill obliged to pay the ſame rent, after the thing is periſhed, or damaged, that he paid before; the owner would ſuffer no loſs at all, the whole of it would fall upon the purchaſer of the uſe. The country, in which a man has hired land, happens to be the ſeat of war: the enemy ſeizes upon the land, and keeps poſſeſſion of it; by which means the hirer of the land is hindered in his uſe of it. Here the land is loſt to the owner; the damage ſuſtained is properly in the thing itſelf; and conſequently the proprietor can demand no rent of the tenant: becauſe the tenant ought not to bear the loſs of another mans property. But ſuppoſe the enemy, inſtead of ſeizing upon the land, had foraged upon it, and carried away the graſs or corn, that was growing there; this loſs does not affect the thing itſelf, but the uſe of it only; and as it ought therefore to fall upon the tenant, he would be ſtill obliged to pay rent.

There

There is one exception to the rule, which ſubjects the owner to the loſs, and not the hirer, where the uſe is made worſe, by the thing itſelf becoming worſe. This exception is, when the thing is made worſe through the fault of the hirer. It would be unjuſt to make the proprietor ſuffer for the neglect or fault of his tenant. If a tenant hires land to ſow with corn, and impoveriſhes that land by his bad management of it; though the uſe of the land here becomes worſe, becauſe the land itſelf is worſe, yet he cannot expect any abatement of rent: becauſe it is not ſo much the fault of the land, as his own fault, that it is in ſo bad a condition: it would have been as good as it was, if he had taken ſuch care of it as he ought to have taken.

The contract of letting and hiring, like that of buying and ſelling, is binding upon the perſons of the parties concerned in it, as ſoon as they have agreed upon the rent. But ſomething farther is requiſite to give one of them a right to the money, and the other a right to the uſe. Delivery of the money in whole or in part gives the owner of the thing to be let a right to the money; and upon his acceptance, as he knows upon what conſideration this payment is made, the hirer has a right to the uſe of the thing. In this manner the owner tacitly makes over the uſe. But he may likewiſe do it expreſsly by words of preſent time either ſpoken or written.

The bargain even as to fixing the rent may poſſibly be tacit on both ſides. As if I have hired a houſe or lands for ſome years, and after my term, for which I at firſt hired them, is out, I continue to live in the houſe, or to occupy the lands; as both parties knew what conditions they had agreed upon before; from this

this act of mine and from the owners giving me no disturbance, the reasonable and necessary presumption is, that we approve of the former conditions, and are still willing to abide by them.

Letting and hiring of labour.

XXV. In letting and hiring of labour; if we hire the labour of a man in general for a certain time; whatever accident may happen to him, and disable him from labouring, he has a claim to his wages; provided he is willing, under such inability, to do us all the service that he can: because what we purchased was his labour for that time: whether therefore his labour within that time is little or much, it is all that we can claim: and when our claim is satisfyed, it will be unjust to diminish his. But if we hire him to do any particular work, and not merely for any certain time; whatever disables him from performing that work releases us from the obligation of paying his wages: because he has no claim to them, unless he performs the work, for which he was hired.

[m] If I have hired out my labour for a particular purpose, and the same labour may be profitable to more persons, besides the first hirer; nothing hinders me from taking as much of those other persons as my service to them is worth without any abatement in the wages agreed upon between me and the first hirer. Each of them has here the valuable consideration, for which the wages are due; and it is no damage to the first hirer that I can make an advantage of my labour, besides what I am to receive from him. I am hired to go a journey to do some particular business for the person, who is to pay my wages: I can in the same journey do business for others, without neglecting his: whatever wages I am to receive from him, who first

[m] Grot ibid. § XIX.

hired

hired me, will be due to me, notwithſtanding the gain which I accidentally make of others, who take this opportunity of employing me: ſince my labour is not the leſs valuable to him for being ſerviceable to them.

Loan of conſumable goods.

XXVI. [n] The loan of goods, which cannot be uſed without being conſumed, ſuch as grain, wine, &c. and more eſpecially money, is a contract of mutual benefit, and plainly belongs, to that ſort of contracts, in which things are given for things to be given again. The latin expreſſion for lending things of this ſort *(mutuo dare)* imports a mutual giving. In this reſpect it differs from *(commodatum)* a loan of ſuch goods, as may be uſed without being conſumed: for a loan of this latter ſort is a beneficial contract only on one ſide; the uſe of the things is given by one party, and nothing is given for it in return by the other party.

It is to be obſerved farther, that in ſuch things, as cannot be uſed without being conſumed, the uſe cannot poſſibly be ſeparated from the property; as it may be in other things. One man may either by free grant, as in a loan, or by purchaſe, as in letting and renting, have the uſe of houſes, or lands, or cattle, or books, &c, whilſt another man has the property in them, or the ſole right to diſpoſe of the things themſelves. But no uſe can be made of grain, or wine, or money without diſpoſing of them: the grain muſt be ſold, or muſt be ſpent in the family, or muſt be ſown upon the land; the wine muſt be conſumed in ſome ſuch manner; the money muſt be laid out in purchaſing neceſſaries, or in ſome way of commerce. But whoever has a right thus to diſpoſe

[n] Grotius ibid. § XX. XXI.

of

of the things themſelves muſt have property in them. There is therefore in things of this ſort no right of uſufruct ſeparable from property: but when a man lends them, he makes over the property in them to the borrower; ſince he, who grants the uſe, muſt grant the property at the ſame time, if there is no uſe ſeparable from property.

This might occaſion an enquiry, in what reſpect a gift differs from a loan, where the things given or lent are ſuch, as will be conſumed in uſing; ſince he, who lends them, grants the property of them to the borrower; and he, who gives them, ſeems to grant no more. The difference between them is, that a gift is a grant of property, without any condition of making a return: but a loan is a grant of property under a condition, that, either upon demand, or at a certain time limited, the property in an equivalent ſhall be returned.

Intereſt for money upon what principles to be defended.

XXVII. [o] We may here enquire, whether it is unlawful to take intereſt, or any valuable conſideration, for the loan of ſuch goods as are conſumed in their uſe, more particularly for the loan of money. I would not call the valuable conſideration, which is taken for the loan of money, by the name of uſury: becauſe this word has by common cuſtom been made to ſignify ſuch an exorbitant conſideration, as is oppreſſive and unjuſt. I therefore chuſe to call it by the name of intereſt, which is a word of a milder ſignification, and has not by cuſtom been made odious.

Grotius has mentioned three arguments, which are ſometimes uſed to ſhew, that intereſt is unlawful, or that it is contrary to the nature of the contract between the lender and the borrower, for the former to take

[o] Grot. ibid.

any conſideration upon account of money lent, beyond the payment of the principal money itſelf. Firſt it is urged, that the nature of a loan, ſince it is a beneficial act, will not allow us to take intereſt or any valuable conſideration for what we lend. — We might indeed queſtion here, whether a loan of ſuch goods, as are conſumed in their uſe, is a beneficial contract, or not: but to paſs this over, we may obſerve, that the argument here urged againſt taking intereſt for money lent, if it proved any thing at all, would prove too much. The loan of ſuch goods, as may be uſed without being conſumed, is a beneficial act; and if we will conclude from the nature of a loan, that to take any conſideration for the uſe of money is unlawful, we muſt, for the ſame reaſon, conclude it to be unlawful to take any rent for the uſe of houſes or of land. In the mean time however, it muſt be allowed, that, when we take rent, the contract is changed from one of ſimple to one of mutual benefit; it is then no longer a loan, it becomes letting and renting. But though it is thus changed from a gratuitous contract to one of mutual benefit; it does not follow, that it is changed likewiſe from a lawful to an unlawful one: the latter contract, when it is made upon fair and equal terms, is in its own nature as lawful as the former. — It may be urged in ſupport of this argument, that letting and renting, where the owner has made his bargain accordingly, is indeed a lawful contract, and that he, who has made ſuch a bargain, may lawfully require the payment of rent: but that the loan of books or cattle or houſes or land is in itſelf a contract of ſimple benefit; and that he, who from the firſt, inſtead of letting, has lent any goods of this ſort, has no juſt claim to

rent

rent, or to any valuable conſideration for the uſe of ſuch goods. He may, if he pleaſes, lawfully make ſuch a contract at firſt, as will entitle him to rent: but if he has originally lent his goods, he cannot afterwards lawfully demand any rent; becauſe he cannot make ſuch a demand conſiſtently with his own agreement. Now this, it may he ſaid, is the caſe of money; we lend it, whenever we grant the uſe of it to another: the contract is therefore a loan from the beginning; and conſequently we cannot, conſiſtently with the nature of our firſt bargain, require any intereſt or valuable conſideration afterwards. — But this concluſion has nothing to ſupport it, beſides the ſcantineſs of language: whatever our bargain is in thus granting the uſe of money to another, we always indeed call it lending; becauſe we have no other word to expreſs it by. To make the concluſion a juſt one, they, who urge the argument, ſhould ſhew, that in lending money it is unlawful from the beginning to agree with him, to whom we lend it, that he ſhall give us a valuable conſideration for the uſe of it.

A ſecond argument to prove the unlawfulneſs of taking any intereſt or encreaſe for money lent, is; that money is barren in its own nature; that no profit ariſes from it, without the labour and induſtry of him, who uſes it; and conſequently that this profit, being due to the labour, is the property of the borrower, as his labour has produced it; and the lender, who has had no ſhare in the labour, can have no claim upon the profits ariſing from it. — This argument again would prove too much, if it had any weight at all. Houſes or arable land are profitleſs in themſelves: the advantages ariſing from them are produced by the

labour and induſtry of the occupier. And yet it is not deemed unjuſt, that the landlord, notwithſtanding he bears no part in the labour, ſhould receive rent from the tenant. The fact is, that as in the uſe of houſes or land, ſo in the uſe of money, the profit is due partly to the thing, and partly to the labour: becauſe as the thing would have produced no profit without labour; ſo there could have been no labour, and therefore no profit of labour, without the thing. The conſequence of this is, that the perſon, who labours, and the proprietor of the thing, have each of them a claim upon the profits, which ariſe from the uſe of it.

This anſwer will open the way to the third argument againſt taking intereſt for the uſe of money, and will ſhew it in its full ſtrength. I might urge, when you lend me a certain ſum of money, that by granting me the uſe of it you grant me at the ſame time the property of it; ſince the uſe of money and the property of it are inſeparable. If therefore you demand any encreaſe, when I pay you the principal; you demand more than is due to you: what I received was the property of ſuch a ſum of money; I pay you the ſame ſum of money; and conſequently, having paid you as much as I received, I have paid all, that you can fairly demand. You demand ſomething more than the principal, in conſideration of the uſe: but I reply, that the uſe and property are inſeparable: if therefore your property is returned, what right have you to any thing more? eſpecially if you conſider, that the profit of it, being partly due to the thing and partly to the labour of the uſer, muſt be due wholly to me; ſince you made me the proprietor by lending me the money, and I was confeſſedly the uſer or occupier.

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—This argument would indeed be unanſwerable; if you had not originally bargained for intereſt or encreaſe: for ſince by lending me the money all you do is to make over the property of it to me for a certain time, I cannot ſee, that this act conſidered by itſelf can entitle you to any thing more, than your own property again, when that time is expired. Though the property of the money was mine only for a time, yet it was as much mine, during that time, as if it had been mine for ever. If therefore you would ſecure your juſt claim to intereſt, you muſt take the matter higher; you muſt from the beginning make your bargain accordingly, and muſt ſhew, that a bargain originally made, to receive more than your principal in payment, is conſiſtent with juſtice. It will appear, that ſuch a bargain would be a juſt one, provided you can ſhew, that you parted with any valuable conſideration, beſides the principal money, in making over the property of it to me for any certain time: and this you may eaſily ſhew; becauſe in parting with the principal money you parted with all the gain, which you might have made of it, during the time of its being in my hands, if, inſtead of lending it to me, you had employed it yourſelf in trade or in huſbandry.

This then is the foundation of your claim upon me to receive intereſt for the money lent me; or rather the foundation, upon which you are to juſtify making a bargain from the beginning to receive it. You claim ſuch intereſt in conſideration of the gain, which you might have made by uſing your money yourſelf. Indeed your intereſt cannot fairly be equal to the higheſt gain, which you could have made: you muſt allow ſomething for the uncertainty of this gain; it might

by accident have been leſs than you hoped for: and you muſt allow ſomething for the trouble, which you muſt have been at in making ſuch advantage. When from the uſual gain, which is to be made of ſuch a ſum of money, in trade or in huſbandry, you have deducted a fair allowance for the uncertainty of your expectations, and a fair allowance likewiſe for the price of your labour; the remainder of the clear profits ariſing from the uſe of your money may be conſidered as due to you beyond your principal.

Something more than this may indeed be fairly claimed, where you run any hazard of loſing your principal by my becoming unable to repay it: you may in theſe circumſtances juſtly expect to be paid for ſuch hazard. And upon this account it is, that you may fairly expect higher intereſt, where your ſecurity is bad, than where it is good.

There is indeed one caſe, in which intereſt may be demanded for money lent, though it was no condition of the original loan; and that is, when the money is not repayed at the time fixed for payment. At that time the borrowers property in the money ceaſes, and the lender may demand to be ſatisfyed for whatever damage, he ſuſtains by not having his property reſtored to his poſſeſſion at the time, that it ought to be.

Uſury why forbidden by the Moſaic law.

XXVIII. The authority of the law of Moſes ſeems to weigh the moſt of any thing with thoſe, who maintain, that intereſt is unlawful. Grotius urges upon this head, that the matter of the law, which forbids uſury, though it may not be neceſſary, is certainly commendable; and that, in this view, the law is binding upon chriſtians, who are obliged by the goſpel, not only to obſerve the rules of ſtrict juſtice, but to comply

comply likewiſe with all the moſt perfect and exalted rules of moral duty. An iſraelite, ſays he, was allowed indeed to take encreaſe of a ſtranger, but was forbidden to take it of his neighbours or brethren. Now the goſpel, as he goes on, has taught us to look upon all mankind as our neighbours or brethren. From whence he concludes, that whatever moral duty one iſraelite owed to another; the ſame duty is owing from a chriſtian to all mankind: ſo that no chriſtian, conſiſtently with his religion, can take intereſt or encreaſe of any man for money lent.

Before I examine this argument; it may not be amiſs to inform the engliſh reader, that a paſſage in the book of leviticus relating to uſury is wrongly tranſlated in our bibles. [o] The paſſage is this — And if thy brother be waxed poor, and fallen in decay with thee; then thou ſhalt relieve him, *yea though he be* a ſtranger or a ſojourner, that he may live with thee: take thou no uſury of him or encreaſe; but fear thy God, that thy brother may live with thee: thou ſhalt not give him thy money upon uſury, nor lend him thy victuals for encreaſe. — This paſſage at firſt ſight implys, that the iſraelites might not take encreaſe of a ſtranger or ſojourner; if he was grown poor or fallen to decay amongſt them: they are commanded to relieve their brother, who was in ſuch diſtreſs; not only if he was an iſraelite; but though he was a ſtranger or a ſojourner, they were to take no uſury or encreaſe of him. But it is to be obſerved, that the words, *yea though he be*, are not in the original: and if we render the original literally it will be — Thou ſhalt relieve him, a ſtranger or a ſojourner, that he may live with

[o] Levit. XXV. 35. &c.

thee.— There is ſomething wanting to make the ſenſe full; and inſtead of ſupplying it with the words *yea though he be*, it ſhould have been thus ſupplyed— If thy brother is waxen poor; and fallen to decay with thee, then thou ſhalt help him, a ſtranger and a ſojourner *ſhall help him*, that he may live with thee. —In the common tranſlation it is plane, that a ſtranger or a ſojourner muſt be called the brother of an iſraelite; which is ſo unuſual in the other parts of the law of Moſes, that this alone would be a ſufficient reaſon for concluding, that our tranſlators have miſſed the ſenſe of this paſſage. The intent of the law in this place ſeems to be, that all perſons, who lived under its juriſdiction, whether they were iſraelites or ſojourners, ſhould help a poor iſraelite. This precept is, in this reſpect, like the fourth precept of the decalogue; it extends to all, who dwelled in the land. And we may find a farther reaſon for preferring this ſenſe to the ſenſe, which is expreſſed in our tranſlation, if we compare this paſſage with another, that we meet with in the book of deuteronomy. [p] The law ſays there,— 'Thou ſhalt not lend upon uſury to thy brother, uſury of money, uſury of victuals, uſury of any thing, that is lent upon uſury: unto a ſtranger thou mayeſt lend upon uſury, but unto thy brother thou ſhalt not lend upon uſury.—Here is a plane difference made between thoſe, who are called brethren, and thoſe, who are called ſtrangers. Nay we find, that the iſraelites were allowed to lend upon uſury to ſtrangers, though they were forbidden to lend upon uſury to one another. And ſince, according to the common tranſlation of the paſſage cited from leviticus, they were alike for-

[p] Deut. XXIII. 19, 20.

bidden

bidden to lend upon uſury either to their brethren or to ſtrangers, it is evident that our tranſlators muſt have miſtaken the ſenſe of that paſſage; becauſe the ſame law cannot expreſsly allow in one place what it expreſsly forbids in another.

If then it appears, that the iſraelites were forbidden to lend upon uſury to one another only, and were, without exception allowed to take uſury of ſtrangers; the conſequence will be, that there can be nothing morally wrong in the practice itſelf: if there had, they would have been forbidden it in reſpect of foreigners, as well as in reſpect of one another: ſince what is wrong in itſelf, is as much ſo, when practiſed towards one ſet of men, as when practiſed towards another ſet. But if this practice was not forbidden to the iſraelites upon account of any viciouſneſs in it, then, notwithſtanding the perfect morality, which chriſtians are obliged to, we cannot conclude from this precept in the moſaic law, that it is unlawful for chriſtians to take intereſt for money lent.

In fact this precept ſeems, from the diſtinction made between iſraelites and ſtrangers, to be of a political rather than of a moral nature: and no part of the merely political law of Moſes is binding upon chriſtians. The circumſtances of the hebrew nation, and the moſaic conſtitution of government will ſhew us upon what policy this law was founded. They were not originally a trading nation, and conſequently could make but little advantage by the uſe of money. And beſides, by the moſaic conſtitution the land was equally divided between the ſeveral members of the community; and leſt this equality ſhould in proceſs of time be broken in upon, no perſon was allowed to purchaſe land in

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perpetuity; whatever was bought, was to return again at the year of jubilee to the former owners. With the ſame view likewiſe, that the inheritance of one family or tribe might not paſs into another, and the original equality of land be deſtroyed by accumulation, heireſſes were commanded to marry within their own family or tribe. Since then we may collect from theſe inſtitutions, that the legiſlator intended to preſerve an equality, and to prevent any one perſon or family from growing too rich; a plane reaſon appears, why uſury, eſpecially in a nation without trade, ſhould be prohibited. If it had been allowed of, thoſe, who paid it, muſt have been impoveriſhed; and thoſe, who received it, though they were in ſome meaſure prevented from realizing their fortunes by purchaſes of lands in perpetuity, would yet have grown more rich in proportion to their neighbours, than the law deſigned they ſhould be.

Queſtion relating to a loan.

XXIX. There is another queſtion, which may ariſe concerning a loan. If the value of money ſhould alter between the time of borrowing and the time of paying, it may be aſked, whether the payment is to be made according to the value of the money at the time of borrowing, or according to its value at the time of paying.

Before we can anſwer this queſtion it muſt be made a little more determinate, than it is in this manner of ſtating it. Let us ſtate the queſtion thus. — Suppoſe I have lent a certain number of pieces of any particular denomination, and before the time of payment, thoſe pieces change in their price, or in their relative value, when compared with pieces of ſome other denomination; as ſuppoſe, for inſtance that I lend a hundred guineas,

guineas, which at the time of lending them are each of them worth twenty two ſhillings; but that, before the time of payment, guineas are each of them worth no more than twenty one ſhillings; would it be a ſufficient payment, if the borrower was to return, the ſame number of pieces of the ſame denomination, that is, to return me a hundred guineas again.

Here it would be neceſſary to know, whether the intrinſic or the extrinſic value of the pieces in queſtion had been changed, ſo as to make this alteration in the price of them. Certainly if their price had been altered by a change in their intrinſic value, there would be no reaſon to think it a ſufficient payment.

The intrinſic value of guineas, or of any other pieces of money, can be made leſs only by making them of baſer metal, or by putting a leſs quantity of pure metal into them. Suppoſe then, that I lend a man a hundred guineas of a purer ſort of metal; it ſeems to be ſelf-evident that, if before the time of payment the guineas have been lowered in their intrinſic value, by making them of baſer metal, he does not pay me what he borrowed by returning a hundred guineas made of this baſer metal. I lend a man a hundred pieces of gold, which are called guineas: no one could think, that he would make a full payment by returning an equal number of pieces of braſs of the ſame ſhape and ſtamp. And it would be as planely no full payment, if the pieces returned were a mixed metal of half gold and half braſs: for what I lent was all gold, and what I receive is but half gold. You might ſay indeed that theſe are counters and not guineas. But this is not the true reaſon, why I am not fully paid. It is not the denomination, which gives the value to money,

money, but its weight and fineneſs. The payment is ſhort, not becauſe what I lent were called guineas, and what I receive are called counters; but becauſe the weight and fineneſs of what I receive is not the ſame with the weight and fineneſs of what I lent.

The ſecond way of debaſing the coin is by making a greater number of pieces of the ſame denomination out of the ſame weight of pure metal. Thus if a pound of gold makes forty guineas, and I lend forty ſuch guineas; it would be a ſhort payment, if I was to receive only forty guineas of ſuch a ſize, that three-ſcore of them would weigh no more than a pound. In this rate of payment, the number, and the denomination, and the fineneſs both of the pieces that I lend, and of the pieces that I receive, would be the ſame; and yet I ſhould receive but two thirds of my debt: becauſe the weight of theſe forty guineas is only two thirds of the weight of what I lent.

In reckoning money we are apt, where the denomination and number is the ſame, to conſider the value as the ſame too; without conſidering that the way of eſtimating the quantity of money by the number of pieces is quite accidental. This way of reckoning proceeds upon a ſuppoſition, that all pieces of a certain denomination with ſuch a certain ſtamp upon them, have a certain degree of fineneſs and a certain weight. Upon this ſuppoſition, counting the number of pieces, comes to the ſame in the end as weighing them. But whenever this ſuppoſition has been taken away by keeping the denomination or ſtamp and changing the fineneſs or the weight of the pieces; thoſe, who are not forced to do otherwiſe by poſitive laws, will take the money by tale no longer; but will adjuſt its fineneſs and eſtimate

timate its weight; in order to determine the quantity of pure metal that they receive.

Where the intrinſic value of the pieces is the ſame, their extrinſic value in compariſon of any other pieces, as of ſhillings for inſtance, may be altered, either firſt by debaſing the metal, out of which thoſe ſhillings are made; or ſecondly, by leſſening their weight without debaſing the metal; or thirdly, by the accidental variations in the quantity of ſilver and gold, that are current. But naturally theſe alterations in the extrinſic value of gold, or of guineas made of gold, are of no account: becauſe naturally gold is lent as gold, without any reference to ſilver. It is only civil inſtitution, which has given it this reference, by conſidering all the current coin of a nation, as if it was of the ſame ſpecies; by conſidering for inſtance ſhillings as parts of a guinea, and halfpence as parts of a ſhilling, without regarding the difference of the metal, that theſe ſeveral coins are made of. But naturally, if I lend a hundred guineas, each of which, in reference to ſilver, is then worth twenty two ſhillings, and am to be paid again, when, in the ſame reference, each is worth no more than twenty one ſhillings; I ſhall be fully paid, if a hundred guineas are returned me. The gold that paſſes between me and the borower is to be eſtimated only by its weight and fineneſs; and not by its value in compariſon with ſilver, any more than by its value in compariſon with any thing elſe. It would be readily ſeen to be a very ſtrange queſtion, ſuppoſing I was to lend a guinea, when it would buy five buſhels of wheat, and was to be paid again, when it would only buy four, whether a guinea would be full payment? And it is in the nature of the thing as ſtrange a queſtion, ſuppoſing I

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lend a guinea, when it would buy me twenty two pie-
ces of ſilver, and am to be paid again, when it woul-
only buy twenty one ſuch pieces, whether this is ful
payment? What has made us ſee the ſtrangeneſs of th
former queſtion more readily than of the latter is, tha
guineas and wheat are conſidered by us as different ſpe-
cies of things; ſo that in eſtimating the value of th
one we do it without any neceſſary or cuſtomary refe-
rence to the other. But guineas and ſhillings in a na-
tion, where both of them are current coin, are looke
upon as things of the ſame ſpecies, and as differing on-
ly as a part differs from the whole: by which mean
we are led to eſtimate the value of the one by the pro-
portion, which it bears to the value of the other. Sup-
poſe I lend two pounds and a half of gold in bullion,
which compared with ſilver is at that time worth two
thouſand two hundred ſhillings: it would I imagine be
thought full payment, if I received two pounds and a
half of bullion again; though perhaps at the time of
payment it might be worth no more in ſilver than two
thouſand one hundred ſhillings. For the natural rule
is, that in ſuch things as are eſtimated by number,
weight, or meaſure, it is a full payment, if we return
the ſame ſpecies in equal number, weight, or meaſure.
The coining theſe two pounds and a half of bullion in-
to a hundred guineas, before I lend it, would make no
real difference in the two caſes: for all that is done by
coining is to denote by a certain ſtamp upon each piece,
into which the bullion is divided, what is the weight of
that piece. Coining the bullion might indeed make ſuch
an imaginary difference, as has occaſioned all the diffi-
culty in this queſtion: the bullion being then changed
into gold-coin, we might by that means be led to con-
ſider

ſider it as of the ſame ſpecies with ſilver-coin, and to judge of its value, not by its weight, but by its relative value in compariſon with ſilver-coin.

This reference of gold-coin to ſilver-coin in determining its value, as if they were of the ſame ſpecies, and differed from one another only as greater and leſs, is kept up in civil reckonings by referring both of them alike to ſome common and ſettled denomination: which denomination is ſo far imaginary, that it is quite accidental, whether there are any pieces coined, which anſwer to the ſeveral terms of ſuch denomination, or not. Thus in England our civil way of numeration is by pounds, ſhillings, and pence. All our coin in reckoning money, whether it is gold or ſilver or copper, is referred to this ſtanding denomination; which is in itſelf only an imaginary one. There are indeed ſuch pieces as ſhillings, which anſwer to one term in this common denomination: but it is quite accidental, that there are ſuch pieces: this term in the denomination was not taken from the coin, which is called a ſhilling, but was itſelf the occaſion that ſuch pieces ſhould be coined. And it is plane, that this term might, in reckoning money, be as readily made uſe of, as it is now, though there was no ſuch coin as a ſhilling; ſince another term in the ſame denomination, the term of pounds, is well underſtood, and eaſily applyed; though there is in fact no ſuch coin as a pound.

As far as the civil law, for the ſake of making all the coin, that is in a nation, circulate alike, requires it in all loans and all payments to be reduced to ſuch a common ſtanding denomination, the ſtate of the queſtion now before us would be changed, and the determination upon it muſt be changed accordingly. If I lend

lend a man a hundred guineas, when the value of each guinea is one pound two ſhillings; the ſum, that I lend, is not to be called a hundred guineas, for guinea is no term in the national way of reckoning; it muſt be called one hundred and ten pounds. Here if it be aſked, whether a hundred guineas, when each is reduced to the value of one pound one ſhilling would pay me, the anſwer will be clear; if we conſider what ſum according to the national way of reckoning money a hundred ſuch guineas would make. They would make no more than one hundred and five pounds. And we cannot well imagine, that one hundred and five pounds paid will be a full payment for one hundred and ten pounds lent.

We may put this queſtion in another inſtance, where perhaps the matter will appear clearer. I lend a hundred crowns; and each crown, at the time of lending them, is valued by the law at five ſhillings; by which I do not mean that it is worth five ſuch pieces as we call ſhillings, but that it is conſidered, in reckoning money, as the fourth part of a pound on one hand, or as equal to ſixty pence on the other hand. Before the time of payment, the law reduces theſe pieces in their value, and reckons each to be worth no more than four ſhillings, that is, to be the fifth part of a pound or equal to forty eight pence. Would it be a full payment, if the borrower was to return me no more than a hundred ſuch pieces? If there is any doubt about the true anſwer to this queſtion, inſtead of calling them crowns, call them five ſhilling pieces, when they are lent, and four ſhilling pieces, when they are paid: and then, I ſuppoſe, it will be plane, that four hundred ſhillings paid is not an equivalent for five hundred ſhillings lent.

Now

Now if this be the caſe, when the pieces are called by ſuch names, as expreſs their value in the national way of reckoning; it muſt be the ſame, when we are to count our money in that way, though the ſame pieces ſhould have ſome other technical name. Thus if, in like manner, inſtead of calling the pieces guineas, we call them one-pound-two-ſhilling pieces, when they are lent, and one-pound-one-ſhilling pieces, when they are paid; it is evident, that a hundred of the latter is not a full payment for a hundred of the former.

Upon the whole, where gold-coin is eſtimated by its intrinſic value; no change is made in the value of it, but by a change in its weight and fineneſs: and conſequently, whatever quantity we borrow, a full payment is made, where the ſame quantity in weight and fineneſs is returned. But where in eſtimating it, we refer it to any extrinſic ſtandard, the value of it is changed, by a change in compariſon with this ſtandard, though its weight and fineneſs ſhould continue the ſame: and conſequently, when we borrow any ſum of it computed by this ſtandard, the payment will not be a full one, unleſs the ſum returned, when computed by the ſame ſtandard, is equal to the ſum borrowed.

XXX. [p] A contract of inſurance is void; if it is made, either when the goods enſured are periſhed, and the owner knows it; or when they are out of all danger or hazard, and the enſurer knows it. There can be no contract of any particular ſort, where there is no matter of ſuch contract: and the matter of enſurance is a poſſible but uncertain loſs, againſt which the enſurer undertakes to indemnify the owner: he engages therefore for nothing, unleſs there may be a loſs, and Nature of enſurance.

[p] Grot. ibid. § XXIII.

unleſs that loſs is uncertain. But if the ſhip for inſtance, which the owner enſures, is loſt at the time of enſurance, and he knows it; there is no uncertainty in the loſs, becauſe it has been ſuffered already: or if the ſhip is ſafely arrived in port, and the inſurer knows it, there is no loſs poſſible. Indeed ſuch a contract would be void upon account of the inequality of it. The enſurer engages his work, in conſideration of ſuch a price as his labour would be worth, if he could preſerve the goods in the hazard, which they run: but if the goods are actually periſhed already, he engages for a leſs conſideration than his labour would be worth; becauſe in theſe circumſtances his labour would be worth the whole of theſe goods: if therefore he enſures for leſs than the whole value of the goods, he has not his equivalent. On the other hand; if the goods are ſafely arrived in port, and the enſurer knows this, but the owner does not know it; the owner, if he promiſes any thing at all, promiſes more than the enſurers labour would be worth to preſerve his goods, in ſuch circumſtances: and conſequently the owner does not receive an equivalent for the price, that he gives.

The work or labour of the enſurer, which I have been ſpeaking of, is only a ſuppoſed work or labour: for in moſt contracts of enſurance, he does not labour, nor ever intends it. But the form of the contract ſeems to ſuppoſe that he does — What will you give me to enſure your houſe from fire? that is, what will you give me to make you ſure, that your houſe ſhall not be burnt? The making you ſure, that ſuch an accident ſhall not happen, implys, that I will take care to prevent it, and that, if it is not prevented, you ſhall look upon

upon the loſs as owing to my neglect, and upon that account ſhall require me to make it good.

The neceſſary equality is preſerved in this contract, if the owner gives no more, and no leſs, than the enſurers labour, conſidering the hazard, which the goods run, would be worth, ſuppoſing him able to preſerve thoſe goods from damages.

Mixed contracts.

XXXI. In many inſtances we find two or more of theſe ſimple contracts, which have been already deſcribed, united into one act. [q] Thus if I knowingly and deſignedly give a man more for his goods than they are worth; this is partly a gift, and partly buying and ſelling. This is one of the inſtances made uſe of by Grotius for explaning mixed acts: and perhaps it is more properly called a mixed act than a mixed contract; becauſe that part of it, which is a gift, is no contract. If I bargain with a workman to make rings or veſſels for me out of his own metal; this is partly buying his goods, and partly hiring his labour. Some writers indeed conſider this as merely buying and ſelling; becauſe if I had bought the rings or veſſels ready made, I muſt have paid in the purchaſe both for the materials and for the workmanſhip. And certainly the only difference is, that in this contract the labour is valued particularly, and is conſidered ſeparately from the materials; whereas in buying ſuch rings or veſſels ready made, we uſually purchaſe the thing in its preſent ſtate, without making a ſeparate eſtimation of the materials and workmanſhip. The contract of enſurance is ſometimes mixed with a loan: as when a perſon lends a ſum of money to a merchant for a certain premium, upon condition, that, if ſuch merchants ſhip returns

[q] Grotius ibid. § V.

ſafe, he ſhall receive his principal again, but ſhall loſe his principal, if the ſhip is loſt. This is called bottomry. As he lends the principal money for a premium it is a loan with intereſt; and as his receiving ſuch principal again depends upon what may happen to the ſhip, it is enſurance.

Gain and loſs how adjuſted in partnerſhip.

XXXII. [r] In partnerſhips of trade; goods, or money, or labour under which I include ſkill or management, are by the conſent of their reſpective owners united into one common ſtock. Each partner has in view a benefit to be received, for a benefit which he gives. The ſeparate ſtock of any of the partners alone might be too ſmall to trade with, in the manner propoſed; or the nature of the undertaking may require not only more goods or more money, than any one of them could ſupply, but more labour or more ſkill, than any one of them is equal to. The gain ariſing from the common ſtock of goods or money is the price obtained for the uſe of thoſe goods or money; and the gain ariſing from their joynt labour is the wages obtained for ſuch labour.

If we conſider the gain in this view, it is eaſy to determine what proportion of it each partner ought to receive. In whatever proportion the uſe of one partners goods is more valuable than the uſe of the other partners goods, ſo much more of the gain belongs to the former, than to the latter. I do not mean, that in dividing the gain any regard is to be had to the particular ſhare of it, which aroſe accidentally from the goods contributed by this or that partner; but that after the goods are united in a joynt ſtock by agreement, each partner has a claim to the gain ariſing from it, in pro-

[r] Grotius ibid. § XXIV.

portion

portion to what was the probable value of the uſe of his goods, if he had traded with them ſeparately. And as the probable value of the uſe is in proportion to the value of the goods themſelves; each partners claim upon the gain will be in the ſame proportion. In like manner, where there is a joynt labour, ſince the profits ariſing from it are the wages of that joynt labour, each partner has a claim, not to that particular part of the gain, which his labour earned, for then it would be no partnerſhip, but to ſuch a comparative ſhare out of the common wages or gain, as is proportional to the value of his labour, when compared with the labour of the other.

As the gain of each partner, ſo likewiſe the loſs of each, ought to be proportionable to the value of what he contributes. As much as the goods, which one partner contributes, exceed in their value the goods, which the other contributes; ſo much greater is the claim of the former upon the joynt ſtock, than the claim of the latter. Since therefore their reſpective claims, upon the whole ſtock, are in proportion to the ſhare of that ſtock, which came originally from each of them; their claim upon each part of the whole muſt be in the ſame proportion. And conſequently, if any part of the ſtock is loſt, each partner, having a claim upon ſuch part loſt in proportion to his original ſhare, loſes a claim in the ſame proportion, that is, the loſs of each is in proportion to the original ſhare, which he contributed towards the common ſtock.

This then is the rule for adjuſting the gain and loſs in partnerſhips, where no expreſs agreement has been made to the contrary. Each partner is to receive ſuch a ſhare of the gain, or to bear ſuch a ſhare of the loſs, as has the ſame proportion to what any other of the

partners receives or bears, that the ſhare contributed by the former has to the ſhare contributed by the latter. The intereſt or claim of each upon the whole ſtock is in this proportion: and conſequently the intereſt or claim of each in the encreaſe or decreaſe of it, in any part added to it, by way of gain, or in any part taken from it, by way of loſs, ought to be in the ſame proportion.

Partnerſhip mixed with enſurance.

XXXIII. If the parties agree, that one of them ſhall have a ſhare in the gain, but ſhall bear no ſhare in the loſs; the contract is a mixed one: it is partly partnerſhip, and partly enſurance. As they are all of them to have a ſhare in the gain, it is partnerſhip: but he or they, who are to bear all the loſs, enſure the principal ſtock of him, who is to bear none of it.

To adjuſt the ſhares, which each party in ſuch a mixed contract is to receive in the gain, we are to conſider what it is worth to enſure his principal, who is not ſubject to any loſs. And when the value of ſuch enſurance is deducted from the whole gain, and aſſigned to thoſe, who were to have born all the loſs, if there had been any; the remaining gain is to be divided in proportion to each partys ſhare in the capital ſtock.

Contract of one partys bearing the whole loſs without ny ſhare in the gain.

XXXIV. It is generally maintained to be contrary to the nature of partnerſhips, that, where a capital ſtock is made by mutual conſent, the parties ſo forming a capital ſtock ſhould agree, that one of them ſhould have all the gain, and the other bear all the loſs. And certainly ſuch an agreement is contrary to the nature of partnerſhip; if we define partnerſhip to be a contract which gives the parties a common claim to the joynt ſtock: becauſe where they have a common claim to

the ſtock, they muſt in conſequence have a common claim to the gain ariſing from it; and to the loſſes ſuſtained in it.

But ſuch an agreement, though it may be inconſiſtent with the nature of partnerſhip, is not inconſiſtent with the law of common juſtice. A man wants five hundred pounds capital ſtock to enter upon a certain branch of trade; he has only three hundred pounds of his own. I agree to let him have two hundred pounds to make up his capital; upon condition, that he ſhall have all the advantage ariſing from the whole, that, if he ſaves the whole capital, my money ſhall be returned, but that, if any part of it is loſt, I will bear the loſs, as far as the two hundred pounds which I have advanced. There can, I think, be no queſtion, whether the law of nature would allow of ſuch an act of humanity as this. You may ſay, that ſuch an agreement is contrary to the law of partnerſhip. I grant it is, and therefore am ſatisfyed, that it ſhould not be called a partnerſhip. I only inſiſt, that the agreement is not contrary to the law of nature, and leave it to you to call it by what name you pleaſe. Perhaps you may have no name for it; but a contract is not the more unlawful for wanting a name.

Work and money how compared in partnerſhip.

XXXV. [e] In partnerſhip, where work is contributed on one ſide, and money on the other; the partner, from whom the money comes, may contribute either the uſe only of the money, or the property of it.

If he contributes only the uſe of it, and ſtill keeps his property in the principal, ſo that the joint ſtock is to be conſidered as made up of the labour of one partner and of the uſe of the others money; it is plane,

[e] Grot. ibid.

that, ſuppoſing the principal to be ſafe, it belongs to him, and that, ſuppoſing it to be loſt, he alone is to bear ſuch loſs. The other partner, who contributes work, ſince, as the caſe is put, he had no claim to the principal money, or to any part of it, cannot be obliged to make good any part of that loſs, or to bear any ſhare in it.

But if he contributes the property of his money, ſo that the joynt ſtock, upon which each of them has a common claim, is made up of his principal money and of the others labour; then the partner, who labours, has a claim upon the principal money itſelf: and conſequently, whenever the partnerſhip is diſſolved, if the principal money or any part of it is ſafe, he ought to have a ſhare in it; and if the principal is loſt, he is a ſufferer by loſing ſuch ſhare.

In the former caſe, where he, from whom the money comes, ſtill keeps his property in it, and has a right to the whole principal, you may aſk what it is, which he contributes? But the anſwer is obvious. He contributes the uſe of his money, that is, he contributes the clear gain, which he might probably have made of it himſelf. This however is not all. He contributes beſides this the hazard of his principal; becauſe if the whole, or any part of it ſhould be loſt, the loſs is his. In order therefore to adjuſt the ſhare, which each partner ought to have in the gain, if there is any; you are to value the work of one, and the uſe and hazard of the others money: and in proportion to the value contributed by each of them, upon ſuch an eſtimate, their reſpective gains are to be ſettled.

In the other caſe, where he, from whom the money comes, contributes the property of it, and the other con-

contributes his labour; in adjuſting their reſpective ſhares of the gain, you are to value the money of one and the labour of the other. And when the comparative values of what each has contributed are thus ſettled; their reſpective ſhares in the gain are to be in the ſame proportion.

Contracts how diſſolved.

XXXVI. It is plane from what has been ſaid of contracts, that the obligation ariſing from them may be diſſolved by the conſent of the parties concerned in them. The ſame mutual conſent, by which the obligation was originally produced, can deſtroy it again, without any injuſtice to either party: ſince, whatever claim the contract gave them, each of them agrees to give up that claim; whenever by ſuch mutual conſent they diſſolve that contract.

The obligation however does not ceaſe by any declaration of one of the parties alone, that he will not ſtand to his bargain; unleſs the other agrees to releaſe him: an obligation, which was produced by the concurrence of both their wills, cannot be deſtroyed again by the will of only one of them: he who declares, that he will not ſtand by his bargain, cannot by ſo doing juſtly take away the right, which the other had acquired by the contract; unleſs the other conſents to part with that right.

Another way, in which the obligation of a contract ceaſes in reſpect of one of the parties, is by the non-performance of the other. In all contracts of mutual benefit, whatever obligation one party is under to give or to do it, is undertaken upon condition of his receiving the equivalent agreed upon. If therefore he fails of receiving ſuch equivalent by the others non-performance; the condition fails, upon which he conſented to

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be obliged; and conſequently he ceaſes to be under any obligation.

But it may perhaps be worth our while to be a little more particular in conſidering the ſeveral ways in which partnerſhips are diſſolved.

Firſt, partnerſhips are diſſolved by the mutual conſent of the parties concerned in them: for as in all other contracts, ſo in theſe, an obligation ariſing from their mutual conſent may be deſtroyed by the ſame cauſe, that produced it.

Secondly, they are diſſolved by the accompliſhment of the buſineſs, for which they were formed. If the partners conſented to form a joynt ſtock, and to give each other, by mutual conſent, a common claim upon it, only for a certain purpoſe; this purpoſe limits their conſent; and in conſequence it limits the obligation ariſing from that conſent. Whenever therefore the purpoſes are brought about, which led them thus to joyn together, the obligation of continuing ſo connected is at an end.

Thirdly, partnerſhips, if they were formed only for a certain time, ceaſe at the expiration of that time. The partners, in their original agreement, limited their obligation to one another, and the mutual claims, which each has upon the things of the other; and by ſo doing, by conſenting to ſtand thus obliged for a certain time, they planely ſhewed, that it was not their deſign, or that they did not conſent to be obliged any longer.

The renunciation of one partner, without the conſent of the other, when the purpoſe of the partnerſhip is not accompliſhed, or when there either was no time limited, or that time is not expired, is not ſufficient

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to diſſolve the partnerſhip. No obligation can in its own nature be deſtroyed, but by the ſame cauſe, that produced it: an obligation ariſing from the concurrence of the wills of two or more perſons cannot be ſet aſide by the ſingle will of one of them. Indeed the partner, who renounces, has it in his power to make it impoſſible by his perverſeneſs for the partnerſhip to go on: but ſtill, though he has a natural power to do this, he has no right to do it; the obligation of the partnerſhip is in force and will obtain its effect. The only way in which it can obtain its effect, in theſe circumſtances, is by giving the other partner a right to ſatisfaction for any damage, which may follow from ſuch a breach of contract.

Neither does the death of one of the partners naturally diſſolve the partnerſhip, as far as goods or money are concerned. The goods or money of the deceaſed, which were part of the common ſtock, were ſubject to the claim of the ſurvivor: and the heir can receive them in no other condition, than what his anceſtor left them in: he can receive them only as part of ſuch common ſtock, ſubject to ſuch claim. In reſpect of labour indeed the caſe would be otherwiſe. Labour is a perſonal act, and conſequently the obligation to perform it, being merely perſonal, cannot deſcend to the heir. Upon this account, as moſt contracts of partnerſhip are ſo mixed, that labour, or ſome perſonal act of induſtry, knowledge, or fidelity have a ſhare in them, it is moſt uſual for partnerſhips to ceaſe upon the death of one of the partners.

Contracts of chance, their nature and obligations.

XXXVII. I have already ſpoken of all contracts of chance, ſuch as wagers or gaming of any ſort, as parnerſhips

partnerſhips; and ſuch they undoubtedly are, though not partnerſhips for trade.

To preſerve an equality in wagers, if the ſtakes are equal on each ſide, the knowledge, which each party has of the uncertain event, that the wager is laid upon, ought to be equal. Each, by what he ſtakes, purchaſes an equal intereſt in right to the common ſtock, which conſiſts of their joynt ſtakes. The chance, which each of them has of winning that whole ſtock, is their reſpective intereſts in fact. But if their intereſts in right are equal; as they are, where they ſtake equal ſums; it is unjuſt, that their intereſts in fact ſhould be unequal. And their claims in fact will be unequal, if one of them knows, which way the event had fallen out, where they lay upon a paſt event, or which way it will fall out, where they lay upon a future one; whilſt the other in the mean time is ignorant of the matter, and looks upon the event as uncertain.

In games, that depend upon ſkill or upon ſtrength, whatever advantage one of the parties has in point of ſkill or ſtrength above the other, ſo much he ought to ſtake more in proportion than the other ſtakes. The intereſt, which he has in fact in the common ſtock made up of both their ſtakes, exceeds the others intereſt in it, in the ſame proportion, that his ſkill or ſtrength exceeds the ſkill or ſtrength of his antagoniſt. And the intereſt, which in right he has in the ſame ſtock, is in like manner proportionable to his ſtake, when compared with the others ſtake. If therefore his ſtake exceeds the ſtake of his antagoniſt, juſt as much as his ſkill or ſtrength exceeds the ſkill or ſtrength of his antagoniſt, their intereſt in fact will be reſpectively as their intereſts in right.

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In general, in all ſuch contracts, as depend upon chance, where the ſtakes are a common ſtock and the chance is to adjudge that ſtock to one of the parties; each party ought to depoſit as much, that is to pay as much for his chance, as that chance is worth: and ſince the value of each perſons chance, when compared with the others, riſes in proportion to his knowledge, ſkill, or ſtrength; it follows, that each partys ſtake, which is the purchaſe of his chance, ought, when compared with the ſtake of the other, to riſe in the ſame proportion.

Contracts with a man to do or give what we might claim are void.

XXXVIII. Thoſe [t] contracts are void, by which we engage to give money, or ſome other thing of value, or to do ſome beneficial act, in conſideration, that he, to whom we ſo engage, ſhall give us, or ſhall do for us, what we might have claimed without any ſuch contract.

Grotius conſiders this queſtion under the head of promiſes, and determines ſuch promiſes to be binding: becauſe, ſays he, a promiſe is binding, though we make it of our own mere motion without any valuable conſideration: and for this reaſon, though the promiſer does not, properly ſpeaking, receive any thing, in return for what he is to give, or to do yet he is obliged to make good his engagement. He does not, properly ſpeaking, receive any thing in return for what he is to give or to do; becauſe what he receives was due to him, or was his own, without purchaſing it, and cannot therefore be looked upon as a return for what he promiſes.

However we ſhould rather conſider this as a contract, than as a promiſe. — If you will let me have

[t] Grot. L. II. C. XI. § X.

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my goods, which you detain from me unjuſtly, or if you, being to ſet as judge in my cauſe, will give a ſentence in my favour, where the right is clearly on my ſide; I will give you ſuch a reward.—Here is money to be given, in one caſe for goods, and in the other caſe for work. And ſuch contracts are void, if each party does not receive his equivalent. But how have I received an equivalent, if all, that I received, was my own before? There muſt in fact be ſome force or ſome fraud in the perſon, with whom I have to do; ſince no man, who deſigned honeſtly, would be concerned in ſelling me what without paying for it I had a right to.

Contracts void where the matter is unlawful.

XXXIX. [u] If money, or any other valuable conſideration, is promiſed, in order to hire a man to do an act of injuſtice, ſuch promiſe is void.

Grotius determines very ſingularly upon this point. If, ſays he, I promiſe any thing, in order to obtain the doing a criminal act, as ſuppoſe I promiſe money to hire a man to commit murder; ſuch a promiſe is vicious; becauſe it is an enticement to the aſſaſſin to commit the crime. And ſince this viciouſneſs continues, till the crime is over; and ſince all acts, which have a continued viciouſneſs inherent in them, or connected with them, are void; it follows, that, till the crime is committed, this promiſe cannot be binding. But as ſoon as the crime is over, this viciouſneſs ceaſes: becauſe the promiſe can be no longer conſidered as an enticement to the commiſſion of the crime. The obligation therefore of this promiſe, till the crime was committed, was in ſuſpenſe: but as ſoon as the crime is over, the obligation exerts itſelf: for the promiſe

[u] Grot. ibid. § IX.

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was in reality obligatory from the beginning, but its obligation was prevented from taking effect, by a viciouſneſs, which accidentally adhered to it: conſequently as ſoon as this viciouſneſs is removed, by the commiſſion of the crime, the promiſer is bound to make good what he engaged for.

Now this whole matter may well be ſet in a different light. The act of engaging to give wages for the doing a crime is planely a contract: ſomething is to be given for ſomething to be done: and ſuch contract is void on both ſides from the beginning. A contract, which is void on one part cannot be binding on the other part: becauſe if one party is releaſed from his obligation, the other muſt be releaſed of courſe, as having no equivalent for what he is to give, or to do, but merely at the pleaſure or bounty of the former. But on the part of the aſſaſſin, that we may uſe the ſame inſtance with Grotius, the contract is void from the beginning; becauſe he has engaged for ſuch an act, as he has no moral power of performing. If there is any doubt of this; let us ſuppoſe, that the aſſaſſin had promiſed to commit the crime without any promiſe, on the other part, of wages to be given for committing it. His promiſe would, I think, be clearly void; and whatever reaſon would make ſuch a promiſe void, if it had been a gratuitous one, affects it equally, when it is made for a valuable conſideration. But if the promiſe, on the part of the criminal, is void from the beginning; the promiſe of him, who hires ſuch criminal to do the fact, is void too. As the promiſes in this caſe are mutual; the aſſaſſin has a claim to his wages only in conſideration and upon condition of the other partys having a claim upon him to

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do the work: but the other party has no claim upo him to do the work: he therefore has no claim to h wages. The commiſſion of the crime, in this view o the caſe, can give him no claim: for if the contra was void from the beginning, and no other act paſſ in the mean time between him and his principal, wh hires him to do the work; his right to his wages wi ſtand juſt where the contract left it; that is, it will b no right at all.

We may go one ſtep farther. A promiſe of wage to do what is unlawful, though it is not an act of in juſtice, but only an act ſimply wrong, is a void pro miſe. Here again the principal, who engages to giv the wages, contracts with the accomplice to give them in conſideration and upon condition, that he, the ac complice, ſhall be bound to do what is not agreeabl to the law. Now the accomplice cannot bind himſel to this: not indeed becauſe he has no moral power o doing what is ſimply wrong; ſince in caſes of this ſor the law does not take away the power of acting, but only directs the uſe of it: but he is however incapable or has no moral power of binding himſelf to ſuch an act, becauſe ſuch obligation, if it was poſſible, would ſuperſede the obligation of the law. If then the accomplice is not bound by his promiſe, neither is the principal bound by his. The accomplice therefore cannot pretend to have any claim grounded upon the promiſe of the principal: becauſe this promiſe was void from the beginning.

Obligation how reſtored to void contracts.

XL. We have ſeen in what inſtances extorted or erroneous promiſes, contracts for want of equality, and either promiſes or contracts made by perſons under age or out of their ſenſes are void. But when the fear

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is removed, by means of which a promiſe was extorted, or when the miſtake, which occaſioned a promiſe, is ſet right; when the minor comes to years of diſcretion, or the lunatic recovers his ſenſes; or laſtly when the inequality in a contract is diſcovered; ſuppoſe the party, whoſe obligation is void in any of theſe inſtances, is willing to abide by the obligation; what is required in order to bind him? Certainly his mere intention of binding himſelf is not ſufficient; for a mere intention does not bind in any caſe: and from what has been proved already his former act did not bind him. Some new declaration therefore, or at leaſt ſome outward, though tacit, mark of this intention, is neceſſary. It does not indeed ſeem neceſſary, that he ſhould go over the whole form of promiſing or contracting again. One would think, that he ſufficiently ſhews his deſign, either by acting in any inſtance, as if he looked upon himſelf to be ſtill obliged, or even by neglecting, when any fair occaſion offers itſelf, to declare, that he does not acquieſce in the obligation.

CHAP. XIV.

Of Oaths.

I. *An oath what.* II. *Obligation to fidelity.* III. *Obligation to veracity.* IV. *What concealments conſiſtent with this obligation.* V. *Aſſertory oaths confirm an implyed promiſe.* VI. *The nature of an oath.* VII. *Oath where God is not mentioned how to be underſtood.* VIII. *What ſecurity an oath gives to the truth of what is ſworn to.* IX. *Credit due to an idolaters oath.* X. *Oaths may be taken by proxy.* XI. *Oaths and vows how diſtinguiſhed.* XII. *No effect of an oath, unleſs there are outward marks of an intention to ſwear.* XIII. *Want of inward intention, where there is the outward mark of it, does not prevent the effect of an oath.* XIV. *Oath is void, when the pact is ſo, with which it is joyned.* XV. *Oath to a robber binding.* XVI. *Effect of an oath does not extend to the jurors heirs.* XVII. *Oaths to do harm not binding as vows.*

An oath what.

I. [w] AN oath is a ſolemn act, by which we renounce our hope of Gods mercy, or devote ourſelves to his diſpleaſure, if we are guilty of falſhood. It is ſometimes defined to be a religious act, by which God is called upon, as a witneſs, to confirm what might otherwiſe be doubtful.

The doubts, which an oath is made uſe of to remove, are either ſuch as relate to our fidelity, in what we promiſe, or ſuch as relate to our veracity, in what we affirm or deny. And oaths are accordingly divided into two ſorts, promiſory and aſſertory: the former

[w] Grot. L. II. C. XIII. §I.

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are designed to ascertain our fidelity in promises; the latter to ascertain the veracity of our assertions.

But in fact all oaths seem properly to be promisory ones: for when a person is sworn to tell the truth; in such an oath a promise to tell the truth is implyed, and this promise is in reality what he swears to. When a witness is sworn in a court of justice, that the evidence, which he gives, shall be the whole truth and nothing but the truth; he, by consenting to swear under this form, planely consents, or in effect promises, to speak the truth. If he is sworn to give true answers to all such questions, as shall be asked of him; his agreeing thus to swear contains or implys a promise, that his answers shall be true.

The distinction between assertory and promisory oaths is usually placed in the different time of the fact sworn to. All facts are either past, present, or future. Those only are called promisory oaths, which ascertain the existence of future facts: and those are called assertory oaths, which ascertain the existence of past or present facts.

But neither will this distinction preserve a difference between them: for when the juror engages, that he will tell the truth, as far as he knows it, in relation either to past or to present facts; though the oath may be said indirectly to ascertain the existence of such facts, yet what it ascertains directly is the future fidelity of the juror in relating those facts.

Obligation to fidelity.

II. Before we proceed any farther in our enquiry concerning the nature of oaths, and the obligation, which arises from them; it may be proper to say something concerning the general reason of our obligations to fidelity and to veracity, that is, our obligations not

to falſify either in what we promiſe, or in what we affirm or deny.

The obligations to fidelity have been explaned already under the heads of promiſes and contracts: and the immediate cauſe of theſe obligations has been ſhewn to be our own conſent. Every breach of fidelity, either in promiſes or in contracts, is a violation of that right, which by our own conſent we conferred upon him, to whom we promiſed, or with whom we contracted.

It would be an idle queſtion to aſk, from whence the obligation ariſes to mean what we ſay, or to conſent with our minds to what our words expreſs. In our intercourſe with mankind, the ſettled marks of our intentions are always underſtood to ſtand for our intentions themſelves. The demands, which others have upon us, do not ariſe from the mere intention of the mind, which can be known no otherwiſe, than as it is expreſſed in our words or in our actions: they ariſe from our intentions ſo made known: and conſequently they extend as far as our intentions are made to appear by our words or actions. So that if we do not comply with what we have thus expreſſed, we are guilty of injuſtice towards them, to whom we have given ſuch demands, or, to ſpeak more exactly, to whom we have given a right to make ſuch demands.

Obligation to veracity.

III. The obligations, that we are under to ſpeak the truth in what we affirm or deny, have been rendered leſs obvious by the ſeveral ſuppoſed allowances of diſſembling or falſifying. *Grotius ſuppoſes the general notion of a lye to conſiſt in ſpeaking, or in writing, or in uſing any other outward ſigns, in ſuch

*L. III. C. I. § XI.

a manner, that what we ſpeak, or write, or otherwiſe ſignify, cannot be underſtood in any ſenſe, but ſuch an one as is different from our real thoughts. But then, as he rightly obſerves, ſomething farther muſt be added to this general notion of a lye, to make it naturally unlawful: for there is nothing contained in this deſcription of it, which will ſhew it to be ſo. Indeed words or geſtures have their ſignificancy given them by uſe or cuſtom, which may be looked upon as a general agreement. The conſequence of which is, that if I would have my mind known, I am under a neceſſity of uſing ſuch words, or ſuch geſtures, as by cuſtom or general agreement have been made expreſſive of my thoughts. But a cuſtom or agreement, which has done nothing more, than give words or geſtures their current ſignificancy, can never bind me to make my mind known. The eſtabliſhed meaning of certain geſtures, or of the words of that language, in which I ſpeak or write, will force me to uſe thoſe geſtures or words agreeably to this eſtabliſhed meaning, if I have a mind that the perſon, to whom I uſe thoſe geſtures, or to whom I ſpeak or write, ſhould know my thoughts.

But this is not the queſtion. The queſtion is, why I am obliged to let him know my thoughts. The general conſent, which eſtabliſhed the ſignificancy of words or geſtures, does not oblige me to this: becauſe I can comply with this eſtabliſhment, and yet can at the ſame time not only conceal my thoughts, but make him believe them to be different from what they are. I can uſe words or geſtures according to that meaning, which cuſtom has given them, though it is even contrary to what I have in my mind. A man aſks me, which way Titius went? I know that he is gone

northward: if I have a mind, that he ſhould know it too; the general agreement, which has eſtabliſhed the meaning of words or geſtures, will force me to ſay, that he is gone northward, or to point that way. But if I have no mind, that he ſhould know it; that general agreement will not oblige me to uſe theſe words or geſtures. I uſe ſuch words and ſuch a geſture, as is conſiſtent with this general agreement, if I point the contrary way, or ſay, that he is gone ſouthward; upon ſuppoſition, that I have a mind the enquirer ſhould think, that he went a contrary way to what I know him to be gone.

Now the difference, which Grotius adds to the general notion of a lye, to make it unlawful, is its inconſiſtence with ſome right in the perſon, to whom I direct my diſcourſe, to whom I write, or to whom I make uſe of any geſtures, to which cuſtom has given a ſignificancy. Upon theſe principles all lyes do not ſeem to be naturally unlawful, thoſe only ſeem ſo, which are inconſiſtent with ſome right either perfect or imperfect in thoſe perſons, with whom we are converſing. But becauſe the word lye is ſo hateful, [y] Puffendorf, though he differs in fact very little from Grotius, diſtinguiſhes falſhoods of ſpeech, not into lawful and unlawful lyes, but into lyes and untruths. A lye, ſays he, conſiſts in making our words or other ſigns bear a different ſenſe from our real conceptions; where the perſon, to whom theſe words or ſigns are directed, has a right to underſtand, and to judge of thoſe conceptions, and we on our part are obliged accordingly, to make him apprehend our meaning. Whereas an untruth conſiſts in applying our words or other ſigns in ſuch a manner, that the perſon, to whom they are

[y] B. IV. C. I. § IX.

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directed, ſhall conceive from them a different ſenſe from what we have in our mind; when that perſon has no right to know our thoughts, and no man is prejudiced by our concealing them.

It is allowed then by theſe two judicious writers, and cannot, I think, be denyed by any one, that where the perſon, to whom we direct our diſcourſe, has any right to know our real thoughts, it is unlawful to falſify. But when I direct my diſcourſe to a man, or behave towards him, whilſt I am diſcourſing, in ſuch a manner, that all the world, who heard and ſaw me, would conclude, that I deſigned, to inform him of the truth; do not I, by ſuch diſcourſe and manner of behaviour, tacitly conſent to inform him of it? Though therefore he might have no previous right to ſuch information; yet this conſent of mine gives him a right at the time: and I ſhould act contrary to this right, ſo conferred upon him by my tacit conſent, if I was to tell him a falſhood. This principle will leave but few untruths, which are not to be ranked in the claſs of unlawful lyes: it will reduce to this claſs of lyes, not only ſuch falſhoods, as will directly injure a man, or hinder his innocent benefit; but all ſuch falſhoods likewiſe, as are inconſiſtent with that tacit conſent to tell him the truth, which appears from our converſing with him, as if we deſigned to tell him it: becauſe theſe falſhoods, as well as the other, will come under the deſcription of being contrary to a right of his either perfect or imperfect.

It may perhaps be aſked, whether this right of knowing the truth, which is only conferred by our tacit conſent in the manner, that we have been deſcribing, is of ſuch a value, that it can be looked upon as

an injury not to do what we have ſo conſented to do; unleſs there is ſome other damage done to the man that we are converſing with, or to ſome one elſe, by our telling him a falſhood. Certainly in ſome caſes it may be of no great importance to him, or to any one elſe, whether we deceive him or not. But then he who has engaged to another, is not at liberty to judge of that others right: the party whoſe right it is to know the truth, may, if he pleaſes, releaſe the ſpeaker from this obligation: but without ſuch a releaſe it cannot be at the ſpeakers option, whether he will comply with the obligation or not, upon pretence, that the hearers right is of ſmall value. To allow ſuch a latitude as this, would effectually deſtroy, not only all obligations to ſpeak the truth, but all obligations whatſoever: ſince the ſame latitude is full as reaſonable in all other inſtances, as it can be in this.

What conceal-ments conſiſtent with this obliga-tion.

IV. Let us now enquire what ſort of concealments or untruths, or diſſimulation this principle will allow of.

Firſt, it is not unlawful to conceal, by our ſilence, what we have no mind to diſcover; provided the perſon, who wants us to make the diſcovery, had no previous right to know the truth. Where he would not be injured, or loſe any innocent advantage by not knowing the truth, he has no right to know it, unleſs we give him one by converſing with him: and conſequently, ſince our ſilence gives him no ſuch right, we lawfully may be ſilent.

Secondly, it is not unlawful, even where we direct our diſcourſe to a man, as if we deſigned to inform him of the truth, to ſpeak what we know is untrue; provided, we are ſure, that he waves his right of knowing

knowing it. This, I ſuppoſe, is the reaſon, why it ſhould not be thought wrong for a priſoner upon his tryal to plead — not guilty; though at the ſame time he is conſcious of the contrary: becauſe the court does not expect or deſire to know the truth, unleſs they can make it out, without his immediate confeſſion of it.

Thirdly, where we have put ourſelves abſolutely under the direction or authority of another perſon, that this perſon may by his authority over us, which we have ſo given him, obtain a certain purpoſe; our rights, as far as the neceſſity of this purpoſe requires, are at his diſpoſal. Whatever right therefore of knowing the truth we might acquire by his profeſſions of telling it, or by his directing his diſcourſe to us, as if he deſigned to tell us it; the authority, which we have given him, ſuperſedes this right, as far as it would hinder the purpoſe, which he is to bring about. This is the caſe of phyſicians in reſpect of their patients, and of commanders in chief in reſpect of the ſoldiers, who are under their authority.

Fourthly, as infants, or ideots, or madmen acquire no right by an expreſs promiſe, ſo neither do they acquire any by our tacit agreement to tell them the truth, when we are diſcourſing with them. Upon this account it is not thought unlawful to deceive them by our words or actions, either for their own benefit, or to prevent them from doing any harm.

Fifthly, it is the eſtabliſhed character of hiſtory to relate facts, as they really happened: they therefore, who undertake to write hiſtory, profeſs by ſo doing to ſpeak the truth, and are for this reaſon obliged to ſpeak it. But writers of fables, or relaters of parables, profeſs only to teach uſeful truths, under feigned ſtories or reſemblances.

reſemblances. They do therefore what they profeſs, and conſequently, what alone they are obliged to do; if they take care to make their fables or parables uſeful and inſtructing; they are not guilty of any unlawful falſhood, though the facts, which they relate in their fables or parables, never happened.

Sixthly, there are ſome actions or other ſigns, by which we profeſs nothing; they are directed to no perſon for his information; but all, who ſee them, are at liberty to take them in what ſenſe they pleaſe. Whoever is deceived by ſuch ſigns, or actions, as theſe, cannot charge them, who make the ſigns, or do the actions, with falſhood. A ſtudent keeps his door ſhut, that he may not be interrupted. The appearance is the ſame, as if he was not at home. But the judgment, which any man would make, who found it ſhut, is not neceſſarily, that he is not at home, but either that he is not at home, or would not have any one interrupt him. Of this ſort are ſeveral ſtratagems made uſe of in war. Whoever is deceived by any feints of his adverſary, cannot charge ſuch adverſary with any unlawful falſhood: becauſe, if he knows any thing, he muſt know, that his adverſary never deſigned or profeſſed to give him information.

Seventhly, when we direct our diſcourſe to any one, who knows the meaning of what we ſay, and a third perſon, who has no concern in it, liſtens to what paſſes between us, there is no unlawful falſhood in ſpeaking ſo as to deceive him. He had no buſineſs to know what paſſed between us; and we did not addreſs ourſelves to him: he had therefore no previous right to be informed of the truth, and we gave him none at the time.

Eighthly,

Eighthly, ſuppoſe a man enquires of me concerning ome matter, which prudence would oblige me to con-al; becauſe ſome damage might ariſe to me or to ome third perſon from his knowing it: am I at li-erty to falſify, in order to prevent him from know-g what I have ſuch reaſons for concealing? If he akes the enquiry inadvertently, there will be no great fficulty in the matter: by telling him, that it is an mproper enquiry, we ſhall get rid of him, without eing under any neceſſity either of anſwering his queſ-on, or of giving him untrue information. But if he akes uſe of any unjuſt force or fraud to find out what e ought not to know; as ſuch injuſtice would hinder im from acquiring any right, even by a direct pro-iſe; ſo it would much rather hinder him from acquir-g any by the indirect and tacit promiſe of telling him he truth, implyed in our addreſſing our diſcourſe to im, as if we deſigned to tell him it.

However it ought to be carefully remembered, that one of theſe concealments, untruths, or diſſimulations re allowable, when any cauſeleſs harm will be done, or ny innocent advantage be prevented by them: be-auſe in all ſuch caſes the perſon, who ſuffers ſuch arm or is hindered of ſuch benefit, has a previous ight to know the truth; and though we were to ive him none by directing our diſcourſe to him, yet uch previous right is violated, if we conceal the truth rom him.

V. It is plane from the nature of promiſory oaths hat they are deſigned to confirm ſome promiſe. And the ame may likewiſe be ſaid of aſſertory oaths, upon the rinciples, that we have been explaning. The general obligation to ſpeak the truth, in what we affirm or de-

Aſſertory oaths confirm an implyed promiſe.

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ny, ariſes from ſome right in the hearer to know it. This right may be prior to our diſcourſe with him; he may have a right to be told the truth, if we tell him any thing: and then our addreſſing ourſelves to him as if we deſigned to tell the truth is the mark of our conſent that this right ſhall take place. Or if there is no ſuch prior right, yet the very addreſſing ourſelves to him gives him a right to know the truth; becauſe it implys a tacit conſent, that we will tell it. All aſſertory oaths therefore, being only deſigned to aſcertain our veracity in what we affirm or deny, contain a promiſe either expreſs or implyed, that we will not falſify.

The general concluſion from what has been ſaid is that oaths of all ſorts are deſigned as confirmations of ſome expreſs or implyed promiſe. We are next to conſider in what manner ſuch a confirmation is produced by calling God to witneſs to the truth of what we ſay or promiſe, or by renouncing his mercy and devoting ourſelves to his diſpleaſure, if we falſify.

The nature of an oath.

VI. [z] The form of an oath, from whence alone we can learn what is the nature and eſſence of it, ſeems not always to be the ſame. Sometimes God is invoked as a witneſs to the truth of what we ſay; and ſometimes he is invoked as an avenger to puniſh us, if we falſify. But theſe forms, though they differ in words, have the ſame meaning. To invoke God, either as a witneſs, or as an avenger, muſt in effect be the ſame thing: ſince what is doubtful can no otherwiſe be aſcertained, by calling upon him to atteſt it, than becauſe, as we are under his abſolute authority, he can, and, as we believe, he will puniſh us, if we do not ſpeak the truth.

[z] Grot. Lib. II. Cap. XIII. § X.

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If we would examine farther into this point, we muſt obſerve, that ſome writers have imagined, what would have depended upon our own teſtimony only, if we had ſimply affirmed it, to be therefore rendered more certain, when we have ſworn to it, or called God to witneſs to it, becauſe the truth of it is then evidenced by the teſtimony of God. But this account of an oath cannot poſſibly be applyed to ſuch oaths as are promiſory.

If I make a promiſe, and then call upon God to witneſs to the promiſe, ſuppoſing me to mean no more by this than barely to call him as a witneſs, I have done nothing towards rendering my fidelity leſs ſuſpected than it was before. What is the effect of his teſtimony, conſidered merely as a teſtimony? Is it deſigned only to evince, that I have made ſuch a promiſe? This is needleſs; becauſe the perſon, to whom I have made the promiſe, wants no ſuch evidence to prove the truth of this fact: he knows it already by the help of his ſenſes, and cannot want to be made more certain of it, than he is. The matter in doubt is, not whether I have made ſuch a promiſe, but whether I will faithfully keep it. And I confeſs, that I cannot ſee how the teſtimony of God, conſidered merely as a teſtimony, can evince my fidelity; unleſs, when he is ſo called upon, he would ſhew by ſome miracle, that he knew I would not break my word.

But if, when I call him to atteſt my promiſe, I mean to make him a guarantee to ſee to the performance of it, and to puniſh me, if I break it; I have then given the perſon, to whom I ſwear, a ſurer pledge, or a ſtronger aſſurance of my fidelity, than if I had ſimply promiſed without an oath. The fear of incurring Gods

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diſpleaſure, to which I have devoted myſelf by callin upon him to ſee to the performance of my promiſe, wi make me leſs likely to break my word, than I poſſibl might have been, if I had not by an oath laid myſe open to this fear.

Since then this notion of an oath, that God is merel invoked as a witneſs, cannot be applyed to promiſor oaths, ſo as to produce any effect in aſcertaining wha would be otherwiſe doubtful; ſince all oaths, eve thoſe, which are uſually called aſſertory ones, contai either an expreſs or a virtual promiſe; and laſtly ſince a oath, according to the common opinion of mankind is made uſe of to aſcertain what might otherwiſe b doubtful; we may conclude, that this notion of a oath is not agreeable to the common opinion or com- mon ſenſe of mankind.

But ſuppoſe we neglect the tacit or expreſs promiſ in thoſe, which are uſually called aſſertory oaths; know not, even upon this ſuppoſition, how the truth of what is affirmed, concerning paſt or preſent facts will be better aſcertained with an oath, than without it if an oath is conſidered merely as an invocation of God to be a witneſs, either to the truth of the fact or to the veracity of the juror. I am in doubt about a fact: a perſon affirms the truth of it: I am ſtill in doubt about it; becauſe I doubt the veracity of the perſon, who af- firms it: he ſwears to the truth of the fact: if by ſo doing he only calls upon God to atteſt either the truth of the fact or his own veracity, my doubt will ſtill re- main. Can he ſay, that the truth of the fact, which was ſupported before only by his own teſtimony, is now ſupported by the teſtimony of God? or can he ſay, that the truth of the fact is ſtill ſupported more immediate-

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ly only by his own veracity, but that his veracity is now ſupported by the divine teſtimony? This is the point, which I am now in doubt upon. I know indeed, that he has, as he ſays, called upon God to atteſt either the truth of the fact or his own veracity; and if I had any evidence, that God did atteſt either of them, when he is ſo called upon, my doubt would be at an end. But there is no evidence at all of this: and conſequently no more evidence, that the fact is true, after he has ſworn to it, than there was before; if this was the whole notion of an oath; if we were to look no farther than the ſuppoſed teſtimony of God, ſupporting either the truth of the fact or the veracity of the juror. I have no more evidence, that God gives teſtimony to what he affirms, merely in conſequence of his having called upon him to give ſuch teſtimony, than I before had of the truth of the fact, merely in conſequence of his having affirmed it.

Perhaps he might ſay, that after he has done this I can have little or no reaſon to ſuſpect his veracity; becauſe it would be ſuch an affront to the truth and to the majeſty of almighty God, to be called upon to atteſt what is falſe, as all but the moſt abandoned villains would tremble at: his fear therefore of thus inſulting and defying God, and of the puniſhment, which every ſober man is ſenſible will be the conſequence of ſuch behaviour, is a ſufficient ſecurity to me, that what he affirms upon oath is true, to the beſt of his knowledge. If he ſays this, I ſhall planely underſtand how much ſtronger ſecurity I have from his oath, than I ſhould have had from his bare aſſertion. But then this is the very point, which I want to make good: if the fear of the juror, when he calls God to witneſs, is the ſecu-

rity,

rity, which his oath gives me, of his telling the truth; then by calling God to witneſs, he underſtands, that God will puniſh him, if he falſifys; or that calling him in as a witneſs, and calling him as an avenger amount to the ſame thing.

The moſt uſual forms of an oath are expreſs to this purpoſe. When oaths are adminiſtered amongſt us in this country, the juror has the goſpels in his hand, and one of the uſual forms of an oath is, that after repeating the matter, to which he ſwears, he concludes with ſaying — ſo help me God, and the contents of this book; that is, may I receive the favour of God, and have a ſhare in the mercies of the goſpel only upon condition, that I obſerve my promiſe or ſpeak the truth. The latter part of this form — and the contents of this book — is frequently omitted: but as the juror has his hand upon the goſpels, when he repeats the ſhorter form — ſo help me God; — this geſture explanes the meaning of his words, and ſhews it to be, that he is willing and deſirous to be admitted to thoſe helps or that favour of God, which the goſpel has promiſed, only upon condition, that he does not falſify. Theſe forms planely ſhew, that the juror devotes himſelf to the diſpleaſure of God by a ſolemn renunciation of his mercies in general, and of his mercies promiſed by the goſpel in particular, if he does not make good what he ſwears to; whether it is to perform a compact, or to tell the truth. There are two forms of an oath mentioned by Livy, which may ſerve to ſhew us, that the jurors, amongſt heathens, as well as amongſt chriſtians, were underſtood to devote themſelves to the anger of their gods, if they broke their oath. In eſtabliſhing an agreement between the

romans

romans and the albans, Sp. Furius devotes the roman people, if they firſt broke the agreement— [a] If the roman people fail to make good this agreement; do thou, o jupiter, ſmite them upon that day, as I now ſmite this ſwine; and ſmite them ſo much more, as thou art greater in power and might than I am — and having ſaid this he ſtruck a ſwine, which he held in his left hand, with a ſtone, which he held in his right. Hannibal, juſt before the battle with the romans at the river Ticinus, having promiſed large rewards to his ſoldiers, confirmed his promiſe with an oath of much the ſame form. [b] He held a lamb in his left hand, and a flint in his right; and whilſt he prayed to jupiter and all the gods, that, if he failed, they would ſlay him, as he then ſlew that lamb, he ſtruck the head of the lamb with the flint.

Oath where God is not mentioned how to be underſtood.

VII. [c] It was not uncommon, amongſt the antients, for perſons to ſwear by other things, without the mention of God, as by the ſun, the ſtars, or the heaven; by their own life, the life of their children, or the life of their prince. Oaths by the ſun, the ſtars, or the heavens, ſeem to have been introduced, when theſe were imagined to be divinities. But ſuch an oath in the mouth of a chriſtian looks like profaneneſs: and I ſhould not ſo much enquire, whether he was guilty of perjury in not keeping it, as whether he was not guilty of affronting God in taking it. Unleſs indeed where a perſon, out of reverence to the name of God, abſtains from uſing it, and means, when he ſwears by heaven, to ſwear by that God, whom we have been taught to call our father, who is in heaven. [d] Sanderſon imagines, that to ſwear by our own life,

[a] Liv. I. 24. [b] Liv. XXI. 45. [c] Grot. ut ſup. § XI.
[d] De juram. oblig. præl. I. § 4.

or the life of our children, or the life of our prince, is tacitly ſwearing by that God, from whom theſe bleſſings were received. But certainly amongſt the antients, who uſed theſe forms, this was not ſuppoſed to be the import of them. The juror meant indeed to invoke the divine vengeance upon himſelf, if he falſifyed; but he did this by devoting to deſtruction what was, or what he pretended to be, of all things moſt dear to him. This, which is the opinion of Grotius, appears to be true from ſome paſſages, that [f] Puffendorf has cited from the antients, for this purpoſe. When Regulus, as the ſtory is related by Pliny, had perſuaded Verania, that ſhe would recover from her illneſs; ſhe called for her will, and made Regulus her heir: it appears from the ſequel by what ſort of an oath he had atteſted the certainty of her recovery: for when Verania was ſoon after this in her laſt extremities, ſhe exclaimed againſt him as a perjured villain, who had forſworn himſelf by the life and ſafety of his ſon. Plinys reflection upon it explanes the intent of ſuch an oath. Regulus, ſays he, makes uſe of this ſtratagem not more frequently than wickedly; whilſt he every day deceives the gods, to whoſe wrath he has devoted this unhappy ſon of his. [g] Lyſias in one of his orations introduces the daughter of Diagiton and widow of Diodotus offering to ſwear by the children both of her former and her ſecond marriage, that Diodotus had committed to the truſt of Diagiton five talents; to which ſhe adds, I am neither ſo abandoned nor ſo covetous, as to leave the curſe of perjury upon my children for the ſake only of leaving them a maintenance. When the king of the ſcythians is ſick, he

[f] B. IV. C. II. § III. [g] Lyſ. edit. Tayl. p. 509. &c.

ſends,

ſends, ſays [h] Herodotus, for three of the moſt approved public diviners to enquire into the occaſion of his diſtemper: and their uſual anſwer is, that ſuch or ſuch a perſon has forſworn himſelf by the royal palace: for amongſt the ſcythians, this oath by the kings palace is reckoned of all others the moſt ſacred. From this laſt mentioned form we may collect, both that ſwearing by the kings palace was underſtood to be the ſame as ſwearing by the kings perſon; in like manner as our ſaviour interprets an oath by the temple to be an oath by him, that dwelleth therein. And we may from thence collect likewiſe, that ſuch an oath, by the kings perſon, was underſtood to devote his perſon to ſome calamity, if the juror falſifyed.

What ſecurity an oath gives of the truth of what is ſworn to.

VIII. It may perhaps be aſked what greater ſecurity we have of a mans veracity or fidelity in reſpect of what he promiſes or affirms upon oath, than we ſhould have had, if he had only affirmed or promiſed the ſame thing without ſwearing to it. Falſhood and perfidiouſneſs are crimes againſt the law of nature, as well as perjury. If therefore either the love of what is right, or the fear of being puniſhed for doing what is contrary to the law of God, is what reſtrains any one from falſifying, when he is upon oath; will not the ſame love of what is right, or the ſame fear of being puniſhed for what is contrary to the law of God equally reſtrain him from being falſe or perfidious, when he is not upon oath? —The great ſecurity, which an oath gives us of his veracity or fidelity, who takes it, ariſes indeed, as is here ſuppoſed, from his fear of offending that almighty being, by whom he ſwears, if he is guilty of falſifying. And it muſt be farther owned,

[h] Herod. L. IV. pag. 243. edit. Gronov.

that a wiſe and a good man will be afraid of falſifying, even though he has taken no oath; leſt by ſo doing he ſhould offend the ſame almighty being. But then theſe are different degrees of fear: the fear of perjury is upon two accounts naturally greater than the fear of ſimple falſhood. Firſt, becauſe perjury is the greater crime of the two; ſince falſhood is only a breach of the laws of God; whereas perjury is a direct inſult upon him and ſets him at defiance. And ſecondly, becauſe he, who is ſimply guilty of falſhood, has room to entertain hopes of forgiveneſs: whereas he, who is guilty of perjury, has devoted himſelf to the diſpleaſure of God, and precluded himſelf from all ſuch hopes of forgiveneſs by renouncing his mercies.

Credit due to an idolaters oath.

IX. [i] From conſidering the principle, upon which our aſſurance of a mans fidelity or veracity depends, when he is upon oath, we may be able to judge what credit is to be given to any one, who has ſworn by a falſe god.

But in determining this queſtion it will be neceſſary to enquire, whether the juror believed the being, by which he ſwore, to be the true God. If he did not, then he certainly would not be afraid of offending what he knows has no power to hurt him, if he does offend: his oath therefore would not in the leaſt aſcertain his fidelity or veracity. He might too perhaps, if he ſhould falſify, acquit himſelf of the guilt of perjury: but then he ſhould remember, that though it could not properly be called an inſult upon God, and a defiance of his power to break ſuch an oath, yet it was the higheſt inſult upon him to ſwear in this manner. It was in fact nothing leſs than idolatry: for an oath is

[i] Grot. ut ſup. § XII.

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an act of religion, which implys, that we acknowledge the being, upon whom we call as an avenger of our falſhood, to have infinite wiſdom and infinite power; ſuch wiſdom however, as can ſearch into our thoughts, and know, whether we do falſify or not, and ſuch power, as can finally exclude us from all happineſs, if we do. He therefore, who ſwears by a falſe god, knowing it to be ſuch, aſcribes by this act ſuch knowledge and power to the being, by whom he ſwears, as belongs only to the true God, and as cannot without the crime of idolatry, be aſcribed to any other being.

But if the juror is firmly perſuaded, that the being, by which he ſwears, is the true God; we have, notwithſtanding the idolatry both of his general perſuaſion and of his particular act, the ſame aſſurance of his fidelity, that we ſhould have of a chriſtians fidelity, who believes in the true God and has ſworn by him. The chriſtians fear of the conſequences of perjury is our ſecurity, that he will not falſify, and is the foundation of that credit, which he obtains upon his oath: and as the pagan, from his perſuaſion of the wiſdom and power of the being, by which he ſwears, is under the ſame fears; we have the ſame ſecurity of his not falſifying: his oath therefore deſerves upon the ſame foundation to obtain the ſame credit.

Whether the true God will puniſh a pagan for perjury, when he has forſworn himſelf by a falſe god, is a queſtion of theology rather than of natural law, and is certainly, however divines may decide it, quite foreign to the point now before us. Our aſſurance of the pagans veracity reſts upon the ſame foundation,

in whatever manner this queſtion is determined: it reſts upon the perſuaſion of his own mind, and upon his fears, which ariſe from that perſuaſion; and not upon the future ſentence to be paſſed upon him by the true God, of whom he is ignorant, and whoſe counſels never come into his deliberation, when he conſiders the conſequences of his perjury.

Oaths may be taken by proxy.

X. It is moſt convenient, that the juror ſhould take the oath in his own perſon, and not by proxy: becauſe by going through the ſolemn outward acts, with which an oath is commonly attended, and by repeating the words of execration ourſelves, we are more likely to be affected with a due ſenſe of what we are about than if another perſon was to go through the form and to repeat the words for us. But otherwiſe there is nothing naturally wrong in allowing an oath to be taken by proxy: ſince, as I could renounce the divine mercy and imprecate the divine vengeance in my own perſon, ſo I can empower another to do it for me: and what he does, who is ſo empowered, is as much my act and binds me as effectually, as if I had done it myſelf.

Oaths and vows how diſtinguiſhed.

XI. Before we go any farther in our enquiries concerning the nature and effect of oaths, it may be proper to take notice of a diſtinction between oaths and vows.

By what has been ſaid already concerning an oath it appears, that by an oath God is called upon to ſee to the performance of what we promiſe, or to the truth of what we affirm, and to puniſh us, if we are found to be perfidious or falſe. So that an oath does not properly contain in it any new and diſtinct obligation, but only confirms the obligation of ſome other act. If I

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make a promiſe to a man, and he accepts it; I am obliged to performance. If he is doubtful about my fidelity, and, in order to remove his doubts, I ſwear to my promiſe; I do not by this act lay myſelf under any new or diſtinct obligation, but only ſtrengthen the obligations, under which I had laid myſelf before: and this I do by introducing the deity as a third party in the obligation, or rather as a guarantee of the pact, to ſee to the performance of it. The effect then of an oath is to annex a peculiar penalty to ſome other obligation: the juror renounces Gods mercy, or devotes himſelf to Gods diſpleaſure, if he does not make good that other obligation.

This effect of an oath is what we mean by the obligation of it. So that, when I ſpeak of the obligation of an oath, I would not be underſtood to mean any ſeparate or diſtinct obligation, but only the effect of it in ſtrengthening ſome other obligation, to which it is joined.

But a vow is a pact, in which there are no others concerned beſides God and the perſon, who makes the vow. It is a promiſe made directly to God himſelf, and is therefore ſuch an act, as produces a diſtinct obligation upon the maker of it.

Some oaths may indeed, from the form of them, produce an obligation, where the juror would otherwiſe have been under no obligation. This is the caſe in aſſertory oaths, where the perſon, who takes the oath, might otherwiſe have been ſilent, and conſequently would not have been obliged to tell the truth, if he had not ſworn to tell it. But then in forms of this ſort we muſt obſerve, that, beſides the oath itſelf, there is a promiſe contained, and ſuch a promiſe, as would

have been obligatory, if it had been expreſſed in ſuch words, as would have ſeparated it from the oath. So that the oath introduces an obligation no otherwiſe, than by being accidentally included in the ſame form of words with the promiſe, from which the obligation properly ariſes. A form of words, which is ſuited to the purpoſe of my ſwearing to tell the truth, contains both a promiſe, that I will do ſo, and an oath confirming ſuch promiſe.

No effect of an oath unleſs there are outward marks of an intention to ſwear.

XII. [k] An oath produces no effect, where it is not attended with ſuch outward circumſtances, as planely ſhew, that he, who goes through the form of it, intends to ſwear. How far his want of inward intention may affect his obligation ſhall be conſidered preſently. This ſeems to be ſo certain, as to make it ridiculous to imagine on the contrary, that he, who repeats the words of an oath, when the occaſion of doing this, or the manner of doing it, ſhew him to have no intention of binding himſelf, ſhould, notwithſtanding this, be bound merely by repeating thoſe words: as if the words of an oath acted like a charm, and could not paſs through a mans mouth, upon any occaſion or in any manner, without binding his conſcience. A clerk in court dictates to me the very words, which I am to ſay in taking an oath, and without mentioning my name ſpeaks throughout in the firſt perſon, becauſe I, who am to repeat the words after him, am to ſpeak in this perſon: the occaſion of his doing this would ſufficiently ſhew, that he had no deſign of ſwearing himſelf; that I, and not he, am the juror; and that whatever is the matter of the oath, I, and not he, am bound to the performance of it.

[k] Grot. ibid. § II.

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However in moſt caſes, all ambiguity of this ſort is effectually provided againſt by ſpeaking in the ſecond perſon, and telling the juror what he is to ſwear, without making him repeat the words: or becauſe, where the oath is long and the matter of it various, it may be the better impreſſed upon his mind, if he is made to repeat them, his name may be inſerted to aſcertain that he is the juror. And in either caſe, in the ſolemn form of an oath, beſides repeating the words, ſome act likewiſe is to be done by the juror, ſuch as holding the goſpels, kiſſing the book, lifting up his right hand, putting his hand under the thigh of him, who impoſes the oath. Such oaths as theſe, from the corporal act of the juror himſelf, are called corporal oaths: and this act, whatever it is, ſufficiently fixes who the perſon is, that intends to ſwear.

Want of inward intention, where there is the outward mark of it, does not prevent the effect of an oath.

XIII. [1] But may it not be aſked, whether the juror is obliged by his oath, or incurs the guilt of perjury in breaking it, ſuppoſing him to go through all the formality of ſwearing, as to the outward acts, in ſuch a manner, that all, who ſee and hear him, would conclude, that he intends to ſwear, but to have in the mean time a reſerve, of not intending to ſwear, in his own mind. A ſimple promiſe, in the ſame circumſtances, would undoubtedly be binding: becauſe thoſe outward ſigns, which either nature ſuggeſts or cuſtom eſtabliſhes for expreſſing or publiſhing our intentions, ſtand in the place of the intentions, which they ſo expreſs. The juror therefore, notwithſtanding his inward reſerve, is certainly under the obligation of his promiſe. And the only doubt, that there can be, in regard to the effect of his oath, ariſes from hence: mankind have no way

[1] Grot. ibid. § III.

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of knowing one anothers thoughts, but by means of the outward ſigns, which are made uſe of to expreſs thoſe thoughts: upon that account our obligations or our claims, ariſing from conſent, can be aſcertained no otherwiſe, than by the intention, which appears; and no regard can be had to any other intention. But the caſe may at firſt ſight appear to be otherwiſe in reſpect of God. He knows the innermoſt thoughts of our heart, though we expreſs them by no outward ſign at all; nor can he be miſled to judge them to be what they are not, though we ſhould make uſe of ſuch outward ſigns as cuſtom has made to ſignify what is directly contrary to our meaning, when we uſe them. Since therefore the effect of an oath, like all adventitious obligations, depends upon our intention, as far as it is known to the party, with whom we are concerned; and ſince the party, with whom we are concerned in oaths, is God, who knows the true intention of our hearts; it may ſeem at firſt ſight, that the want of an inward intention to ſwear will prevent the oath from producing its effect; notwithſtanding we make uſe of ſuch words or other ſigns, as might make us appear outwardly to have an intention of ſwearing. But here it is to be remembered, that the effect of all oaths is to confirm ſome human pact, ſome contract or ſome promiſe, either expreſs or implyed, between man and man. God is called in, not in order to produce any new obligation, but only to ſtrengthen the obligation of ſuch human pact. It is to be remembered farther that, in the very oath itſelf, the juror agrees with the perſon, who impoſes or who accepts the oath, to call God in as a party to their obligation. Thus then an oath, in all views of it, though it calls in God as a party, is in itſelf only part of a human pact: and conſe-

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quently, as in all other pacts between man and man, ſo likewiſe in an oath, the outward declarations ſtand in the place of the jurors intention; and if he falſifys in reſpect of what is expreſſed by ſuch outward declarations, he is guilty of perjury, whatever ſecret reſerves he might have in his own mind.

Oath is void, when the pact is ſo, with which it is joyned.

XIV. From what has been ſaid it ſufficiently appears, that the proper matter of all oaths is ſome other obligation. What we ſwear to, is ſome promiſe or contract, either expreſs or implyed; and the obligation of ſuch promiſe or contract, which the oath is intended to confirm, is the matter of the oath. When therefore the promiſe or contract is void, which the oath was made uſe of to confirm, there can be no effect of the oath; or, to ſpeak in the common language, there can be no obligation ariſing from it. For where there is no obligation from ſuch promiſe or contract, the oath has no matter, and of courſe can produce no effect. We ſwear to make good ſome particular obligation: therefore where that obligation is void, or where there is no obligation, we ſwear to nothing.

[m] Upon this principle all oaths, which are obtained by fraud, are void; if the fact, in which the juror is deceived, was the whole ground or reaſon of his ſwearing: for we have ſeen already, that ſuch erroneous pacts are void in themſelves. In like manner all oaths to the performance of what is impoſſible or unlawful are void: becauſe the pacts are ſo, which ſuch oaths are made uſe of to ſtrengthen. For the ſame reaſon, where an extorted promiſe is void, the promiſer, though he ſhould be ſworn to performance, is not affected by the oath.

[m] Grot. ibid. § XIV.

But

But in the caſe of oaths, which ariſe from fear, w muſt diſtinguiſh, as we did in the caſe of promiſe Whenever a promiſe, which ariſes from fear, is bindin upon the promiſer, an oath, ariſing from the ſame cauſ and applyed to confirm ſuch a promiſe, will have its fu effect. All oaths therefore, which are extorted by an juſt fear are binding; and ſo likewiſe are all ſuch a ariſe even from unjuſt fear, provided the perſon, t whom we ſwear, had no hand in the injuſtice.

Oath to a robber is binding.

XV. [n] It is ſometimes enquired, under this head whether we are bound by an oath, which we ſwear t a robber. Thoſe, who maintain ſuch an oath not to b binding, are apt to confound two other queſtions with this; though they are very different from it. They ei- ther invent ſome unlawful matter for the oath, and then conclude it to be void; or elſe they ſet aſide the obligation of it upon an arbitrary ſuppoſition of its hav- ing been unjuſtly extorted. But in the true ſtate of this queſtion the matter of the oath and the manner of pro- curing it are no way concerned. It is one thing to en- quire, whether an oath to this or that purpoſe is bind- ing; and another to enquire whether an oath, without conſidering the purport of it, is therefore void, becauſe the perſon, with whom we are concerned, is a robber. The former enquiry relates to the matter of the oath, the latter relates only to the character of the perſon, to whom we ſwear. So again; It is one thing to enquire whether an oath unjuſtly extorted is binding; and another to enquire, whether an oath is binding, merely becauſe the perſon, to whom we ſwear, is a rob- ber, without conſidering whether he extorts it or not. The ſtreſs of the preſent queſtion, when ſtripped of all

[n] Grot. ibid. § XV.

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circumſtances, which do not belong to it, reſts upon this ſingle point; ſince a robber is a common enemy of mankind; can any oath, though the matter of it ſhould be lawful, and though there is no particular injuſtice in the manner of obtaining it, oblige the juror? The character of the perſon, to whom we ſwear, is the only circumſtance to be conſidered: and the queſtion is, whether, as there is no intercourſe of ſocial ties between him and the juror, he can have any claim in conſequence of the jurors oath.

When the queſtion is thus ſtated, the obvious anſwer ſeems to be, that ſuch an oath is binding, notwithſtanding the character of him, to whom we ſwear. If there is nothing unlawful in the matter of the oath, nor any injuſtice in the manner of procuring it, the character of the robber does not at all enter into it, and for that reaſon cannot at all affect it. To urge, that he has broken all ſocial ties, and that conſequently he can have no claim ariſing from the natural connections of mankind with one another is nothing to the purpoſe: becauſe the claim in queſtion is not ſuch an one as naturally ariſes out of any ſocial connections with him, but ſuch an one, as we give him by the particular act of ſwearing to him voluntarily for ſome lawful purpoſe. He may indeed, by having, as it were, declared war againſt all mankind, have deprived himſelf of all his former claims: but it does not appear from hence, that it is become impoſſible for him to acquire any claim, though we are ever ſo willing to give him one, and though there is no injuſtice either in our giving him ſuch claim, or in his procuring or accepting it.

*Grotius indeed carrys this matter farther, and maintains, that if our oaths are not directed to man but to

*Grot. ibid. § XIV.

God,

God, that is, if our engagements are properly vows and not oaths; or if they are indeed ſuch, as tend to confer a claim upon them, to whom we ſwear, but any thing can be objected to that claim, ſo as to ſet it aſide; which is the caſe where an oath is extorted; we are then obliged to make good what we have ſworn to, not in virtue of their right, to whom we ſwear, becauſe, by the ſuppoſition, they have no right, but in regard to God, by whom we ſwear. If this reaſoning was juſt, an oath given to a robber, not only when he has procured it fairly, but when he has extorted it by unjuſt fear, would be binding upon the juror.

To clear up this matter we will firſt ſuppoſe our engagement to be properly an oath: where beſides the appeal to God, there is the appearance of ſome right or claim conferred upon the party, to whom we ſwear. If this right or claim is void in itſelf, or if any thing can be oppoſed to it, which would ſet it aſide, ſo that the promiſer, if he had not ſworn, would not have been bound to performance; yet if he has ſworn, the oath, ſays our author, will bind him. Now this deciſion planely proceeds upon this falſe principle, that the oath is a diſtinct covenant in itſelf, and not a part of the pact, which it is intended to confirm. But the true notion of an oath, as already explaned, ſhews that it is no ſuch diſtinct covenant, that it does not properly contain in it the notion of an obligation, if we ſeparate it from ſome other obligatory pact, with which it is joined: the obligation of it amounts to no more, than the addition of an extraordinary penalty, if we falſify in that pact. If therefore we take away the obligation of the pact, to which ſuch penalty has been annexed by ſwearing to it; what becomes of the penalty, that is,

comes

of the obligation of the oath? I make a promiſe or engage in a contract: by this act I oblige myſelf to do or to give ſomething. I ſwear to this pact; the oath ſtrengthens this obligation, by ſubjecting me to an extraordinary penalty, if I do not act conformably to my obligation. But by ſome flaw in the pact there happens to be no obligation ariſing from it: how therefore do I incur the penalty annexed? I am ſubject to it, if I do not do what I was obliged to: but I am, on account of that flaw in the pact, obliged to nothing; and conſequently, let me act as I will, I am clear of the penalty.

If we ſuppoſe, what is not true, that the oath is an obligatory act diſtinct from the promiſe or contract confirmed by it; the obligation of an oath, in this view of it, is between God and the juror; ſo that it will in effect amount to a vow. We ſhall therefore ſee how the caſe would ſtand upon this ſuppoſition, if we conſider what would be the effect of a vow in ſuch circumſtances. Suppoſe therefore a vow to be unjuſtly extorted; does ſuch vow bind the perſon, who is thus forced to engage in it? To determine upon this queſtion, it will be neceſſary to obſerve, that as a promiſe made to a man does not oblige, unleſs he, to whom it is made, accepts it; ſo neither does a vow, which is a promiſe made to God, oblige, unleſs God accepts it. Whenever therefore we have ſufficient reaſon to believe, that God does not accept a vow, ſuch vow is not binding. Now the caſe ſuppoſes ſome damage to ariſe from the vow to the party engaging in it; which damage is the effect of the other partys injuſtice, who extorts it by the uſe of force. I cannot therefore ſee what grounds there can be to imagine, that God accepts ſuch a vow,

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unleſs we would make him a party in the injuſtice, and ſuppoſe, that he conſents to the damage, which muſt be ſuſtained by the performance of it.

Effect of an oath does not extend to the jurors heirs.

XVI. [p] Whatever effect there is in an oath, merely as an oath, or as it ſubjects the juror to the guilt of perjury, if he falſifys, this effect does not deſcend to the heirs of the juror. It has indeed been ſhewn elſewhere, that as far as any contract, which has been confirmed by an oath, affects the goods of the juror, ſuch contract will bind his heirs. But then it does not bind them under the penalty of perjury: becauſe an oath is a perſonal appeal to God; it is an act, by which the perſon, who makes this appeal, imprecates the divine diſpleaſure upon himſelf, or renounces for himſelf the divine favour, if he does not perform what he ſwears to: and conſequently the penalty of incurring the divine diſpleaſure, or of forfeiting the divine favour, if the oath is not kept, is merely perſonal, or does not affect the jurors heirs.

A man may endeavour to extend this penalty farther, by wiſhing a curſe upon his heirs, by imprecating the divine diſpleaſure upon them, or by renouncing the divine favour towards them, if they do not perform what he has ſworn to. But whatever fear ſuperſtition may produce in them upon account of ſuch an execration; it is very evident, that reaſon and religion would ſhew it to be impoſſible for any one to renounce the favour of God and the hopes of his mercy for any one but himſelf; and conſequently that the penalty of perjury is confined wholly to himſelf, however he might endeavour to extend it to his heirs.

[p] Grotius ibid. § XVII.

XVII

XVII. When we threaten to do any cauſeleſs harm, and ſwear to put thoſe threatenings in execution; it is plane that ſuch an oath confers no right at all upon any one. It certainly confers no right upon the perſon, who is to ſuffer this harm; or if we could imagine it to confer any, we may be ſure it is ſuch a right as he very readily gives up; becauſe we are ſure that he, like all other men, is deſirous to keep free from ſuffering harm. And if we have engaged to do him this harm by a promiſe made to ſome third perſon, which promiſe we have ſworn to; this promiſe is void. If therefore we apprehend ourſelves to be bound under the penalty of perjury to do ſuch harm, it muſt be by an obligation to God, in the way of a vow. But the matter of ſuch oaths, even in this view of them, will always be ſufficient to ſet them aſide; ſince we may be certain, that God does not accept them. So that the juror, though he is guilty of profaning Gods name by thus ſwearing, is not guilty of perjury by not doing what he has ſworn.

Oaths to do harm not binding as vows.

CHAP. XV.

Of Marriage.

I. *Marriage what.* II. *Polygamy inconſiſtent with the no-tion of marriage.* III. *The caſe of polygamy under an before the moſaic law.* IV. *Polygamy forbidden by th goſpel.* V. *Divorce forbidden by the law of nature.* VI. *In what manner adultery diſſolves marriage.* VII. *I uſage does not make a marriage void.* VIII. *A ſecon marriage is a nullity, where a former ſubſiſts.* IX. *Wan of conſummation in what inſtances it voids a marriage.* X. *Marriages between relations how made invalid.* XI. *Force may make a marriage a nullity.* XII. *The ef-fects of an error in the contract of marriage.* XIII. *Wan of parents conſent not always ſufficient to make a mar-riage void.* XIV. *Huſbands authority whence it ariſes.* XV. *What concubinage is a good and valid marriage.*

Marriage what.

I. MArriage is a contract between a man and a woman, in which by their mutual conſent each acquires a right in the perſon of the other, for the purpoſes of their mutual happineſs and of the produ-ction and education of children. Little, I ſuppoſe, need be ſaid in ſupport of this definition; as nothing is af-firmed in it but what all writers upon natural law ſeem to agree in. I have mentioned indeed no more parties than a man and a woman: but I would not be under-ſtood by this way of expreſſing myſelf to take it for granted in the definition of marriage, that it is natural-ly unlawful for the ſame man to marry more women than one: this expreſſion is conſiſtent enough with ſuch polygamy; becauſe if he marrys ever ſo many, each

contract

contract is only between a man and a woman. I have defined marriage to be a contract; becauſe mere cohabitation is never, that I know of, called by this name. And the ends or purpoſes, which I have aſſigned; the mutual happineſs of the parties, and the production and education of children; ſeem on all hands to be looked upon as the moſt natural ends of this contract. We will therefore proceed to conſider what determination this notion of marriage will lead us to in ſome of the principal queſtions relating to it.

Polygamy inconſiſtent with the notion of marriage.

II. [q] The chief points, about which moraliſts differ, are polygamy and divorce. Some contend, that the law of nature does not make it neceſſary, for only one man and one woman to be parties in the marriage contract, but allows the ſame man to engage, in this manner, and for theſe purpoſes, with as many women, as he finds convenient. And they contend farther, that the ſame law does not require this contract to be perpetual, but allows it either to expire at ſuch a time as the parties ſhall agree upon at firſt, or to be diſſolved at any time by their mutual conſent. Others maintain on the contrary, that the law of nature forbids polygamy, or does not allow a man to marry a ſecond wife, whilſt the firſt is living; and that the ſame law likewiſe forbids divorce, or does not allow the contract of marriage either to be made temporary from the firſt, or to be diſſolved at the diſcretion and by the conſent of the parties afterwards.

We will firſt examine the queſtion concerning polygamy. And in order rightly to underſtand this matter, it will be neceſſary to obſerve, that whatever is inconſiſtent with the right, which each party gives to the

[q] Grotius L. II. Cap. V. § IX.

other, by the contract of marriage, is inconſiſtent with the contract itſelf, and cannot be conſidered as a part or condition of it. And ſince the law of nature forbids us to break our contracts; it follows, that ſuppoſing polygamy is inconſiſtent with what we agree to in the contract of marriage, with the right, which each party gives the other in his or her perſon, then polygamy muſt be inconſiſtent with the law of nature. The man and the woman, who are the parties in a contract of marriage, give to each other a mutual right in their reſpective perſons. What right the man naturally has in the perſon of the woman, or the woman in the perſon of the man, is to be determined by the natural ends or purpoſes, for which this mutual right is given. If then upon examining this right by thoſe ends or purpoſes, it ſhall be found to be inconſiſtent with polygamy; the conſequence will be, that by entering into a contract of marriage, or by giving each other ſuch a right, they have precluded themſelves from polygamy by the very act of marrying, though they ſhould not preclude themſelves in expreſs terms. Becauſe it is impoſſible to ſuppoſe them to will or intend contrarieties at one and the ſame time: if they have a will or intention to give each other ſuch a mutual right in their reſpective perſons, this will or intention effectually precludes them from willing or intending, at the ſame time, whatever is contrary to ſuch right. We may go one ſtep farther. As the liberty of polygamy is tacitly taken away by the contract of marriage, when nothing is particularly ſaid about it, ſuppoſing, that upon enquiry we find ſuch liberty to be inconſiſtent with the mutual right conferred by the parties; ſo likewiſe, upon the ſame ſuppoſition, the parties cannot give each other this liberty by

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any expreſs conditions annexed to the contract for this purpoſe, at the time of making it: becauſe if the contract itſelf is binding, all conditions, which are inconſiſtent with the obligations of ſuch contract, are void; or if on the other hand theſe conditions are conſidered as binding, then they will ſet aſide the contract or make that void: ſo that wherever there is a valid marriage, it takes away the liberty of polygamy or makes it unlawful; and wherever the man and the woman have ſo contracted as to allow of polygamy, if I may call it ſo, there is no valid marriage. In order therefore to ſhew, that polygamy is naturally unlawful, or that the parties, by their mutual conſent in marriage, have precluded themſelves from the liberty of marrying any one elſe, whilſt this contract continues in force; we are to ſhew, that it is inconſiſtent with the mutual right, which each of them has conſented to give the other in his or her perſon.

Polygamy may be conſidered as of two ſorts; it is either a contract of marriage of one woman with any number of men more than one; or a like contract of one man with any number of women more than one. As to the firſt ſort of polygamy; I do not find, that the writers, who favour polygamy the moſt, undertake to defend it. They ſeem to be agreed in maintaining, that the ſame woman ought not, at the ſame time, to have more huſbands than one; or that, in marriage, the woman is naturally obliged to give the man ſuch a full right in her perſon, for the purpoſes of marriage, as not to leave herſelf at liberty to diſpoſe of her perſon, for the ſame purpoſes, to any one elſe, whilſt he is living. We may therefore take it for granted, that a woman, when ſhe marrys a man, binds herſelf not

to have children by any one elſe, and to contrive only for his happineſs, as a huſband, excluſively of all others; that ſhe binds herſelf to admit none beſides him to ſhare in her bed, or in her conjugal affection. This then being allowed to be the obligation on the womans part, there cannot at firſt ſight, one would think, appear to be any reaſon for imagining the obligation on the mans part to be different from it. When two people give each other a mutual right in their reſpective perſons; the moſt natural concluſion is, that the right given is equal on both ſides; if there is no expreſs reſerve to the contrary. Whatever liberty the woman parts with for the benefit of the man; it is natural, that ſhe ſhould receive an equivalent from him, or that he ſhould part with as much liberty for her benefit. Unleſs therefore ſome exception is particularly agreed upon between them; he muſt be underſtood in marriage to give her the ſame right in his perſon, which ſhe gives him in hers; that is, a full right to it for the purpoſes of having children, and of their mutual happineſs; ſo as to make the effect of the contract the ſame on his ſide, and on hers, by binding himſelf not to admit any, beſides her, to ſhare either in his bed, or in his conjugal affection.

It may be ſaid indeed in reply to this concluſion, or rather to the premiſes from whence it is deduced; that the reaſon, which lays the woman under reſtraints in this particular, does not extend to the man. She is not allowed to have more husbands than one; becauſe if ſhe had, amongſt many huſbands, it would become uncertain, to which of them any child or children of hers belong. Whereas there is no danger of any uncertainty, in the iſſue, from a mans having more wives than

than one: becauſe each of the wives cannot but be ſure which child is her own, and which is anothers. But when this is urged as a reaſon, why, though the man has actually an excluſive right to the perſon of his wife, yet we cannot from thence conclude, that the woman has likewiſe naturally an excluſive right to the perſon of her huſband; they who urge it, ſhould remember, that aſcertaining the iſſue of the man, is ſo far from being the only end, that it is not the principal end, which even he propoſes; and much leſs can we imagine the woman to have no other end in view, but to make the man certain what children are his. And nothing is planer, than that the nature of an obligation, ariſing from a contract, can never be determined by a conſideration, which is but a ſecondary one in the intention of one of the parties, and which never entered at all into the intention of the other. The principal end of each party is the production of children from the body of the other, and the happineſs, which each expects in the conjugal affection of the other. But if theſe are the ends, which they mutually propoſe in contracting to be man and wife, it can never be ſhewn, that the woman, excluſive of all others, has not the ſame right to have children of his body, and to enjoy his conjugal affection, that the man, excluſive of all others, has to have children of her body, and to enjoy her conjugal affection. The happineſs of the woman is of as great importance to her, as the happineſs of the man is to him: and ſhe is under no previous obligation to conſult his happineſs either ſolely or principally, any more than he is to conſult hers. There is therefore no natural reaſon for imagining, that the contract of marriage ſhould have his advantage more in view than hers, or give him a greater

advantage, than it gives her. If each party has an equal advantage in view, they conſent only upon condition of obtaining an equal advantage: and their conſent upon theſe terms will not make the obligation of one of them different from the obligation of the other.

The only way therefore, that is left to make polygamy lawful on the mans part, is by ſome expreſs condition annexed to the contract. But ſuch a condition, if it is inconſiſtent with the ends propoſed in the contract, cannot be annexed, ſo as to be binding upon the woman, without deſtroying the contract. Now the happineſs of the parties in their marryed ſtate is one of the principal ends of marriage. But if domeſtic happineſs for herſelf is the end, which the woman propoſes, and which engages her to enter into the contract of marriage; ſhe conſents no otherwiſe to give the man a right to her perſon, but upon condition of his obliging himſelf to contrive for her quiet and happineſs in the marryed ſtate, as far as he is able. It is unnatural and abſurd to ſuppoſe, either that the woman has not this in view, or, if ſhe has, that ſhe ſhould conſent to give him a right to her perſon upon any other terms. And if the man conſents to take her upon theſe terms, it is evident what obligation ariſes on his part from ſuch conſent. Now no reaſon can be given, why the contract of marriage ſhould not be ſo far like other contracts, that whatever diſcharges the parties on one ſide from their obligation, ſhould at the ſame time diſcharge the parties on the other ſide from theirs, and make the whole contract a nullity. But this is the effect of a liberty of polygamy granted to the man, even with the expreſs conſent of the woman: it releaſes him from the natural obligation of promoting her domeſtic happineſs,

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as far as is in his power: and conſequently, by releaſing him from his obligation, it makes the contract itſelf a nullity from the beginning. So that, notwithſtanding where there is ſuch a liberty, there may be cohabitation, there can be no marriage. I need not, I ſuppoſe, ſet forth the jealouſies and quarrels, which are almoſt unavoidable, where the ſame man has more wives than one: the fact, without enlarging upon it, is evident enough to convince us, that he, who ſhall thus cohabit at the ſame time with a number of women, is far from making the beſt proviſion, that he can, for the domeſtic happineſs of any one of them. Taking then this fact along with us, we may ſee how little force there is in what is ſometimes urged in favour of polygamy; that no injury is done to the former wife by marrying a ſecond in her life-time, if ſhe has conſented to it; ſince the huſband cannot do her an injury by giving her only a part of his affection, when ſhe has beforehand agreed to let him divide his affection between her and others. The effect of allowing ſuch a liberty to him would not be to make it lawful for him to enter into a ſecond marriage, the firſt ſtill continuing in force, but to ſet the firſt marriage itſelf aſide from the beginning, and to make it no marriage at all. We are miſled by calling it a conſent to be ſatisfyed with only a part of his affection; it is a conſent to give him the power of making her happy or unhappy, juſt as his own intereſt or caprice ſhall direct him. If we put a liberty of polygamy, allowed by the woman to the man, into theſe terms, the effect, that it would have upon a contract of marriage by being joyned to ſuch contract, will appear more evidently. The man and woman in the contract of marriage have their mutual

tual happineſs in view, and this mutual happineſs is the end, which determines them to enter into ſuch a contract: each party therefore is underſtood to give the other, by the contract, a right in his or her perſon upon condition only, that each ſhall be bound to promote the happineſs of the other: but the woman in the mean time conſents, that the man ſhall be at liberty to follow his own humour, and to make her happy or unhappy, as that humour ſhall lead him. Such a condition as this is ſo planely contrary to his part of the obligation in marriage, that it is impoſſible for the marriage and the condition to ſubſiſt together: if the marriage is valid, the condition muſt be void; if the condition is binding on her part, who grants it, the marriage muſt be a nullity.

I ſay farther, that the woman is bound in conſcience to ſtipulate for the entire affection of her huſband, and that ſhe puts it out of her power to do her duty, if ſhe conſents to be his wife upon any other terms. Her conſent to be his wife certainly implys, that ſhe conſents to have children by him. And as the production of children is neceſſarily attended, on the part of the mother, as well as of the father, with the duty of providing for them, and educating them in the beſt manner, that ſhe can; ſhe puts it out of her power to do her duty, if ſhe agrees to have children upon any terms, which will put it out of her power to provide for them and educate them, ſo well as ſhe might have done. But certainly ſhe will not be able to provide for them and to educate them, ſo well as ſhe might have done, if ſhe conſents to let him divide his affections between her and other women, and conſequently between her children and theirs. Upon this principle, a liberty of polygamy, annexed to a marriage, muſt at firſt ſight be wrong:

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and perhaps upon a closer inspection such a condition will be found to be void. The duty of the mother to provide for and educate her children may indeed be supposed to be of the imperfect sort; and if it is, a simple transgression of such duty in any act would not be sufficient to make that act void. But in the case supposed the mother does more than simply transgress her duty; she takes from herself the power of discharging it: and the law can never allow the validity of an act, by which the agent, if the act was valid, would be no longer obliged to obey the law.

Before we leave this subject, it may be worth our while to look back to their opinion, who contend, that polygamy on the part of the woman is unlawful upon this principle, that if she was to have more husbands than one, the issue would be uncertain, and the man might place his affection, or employ his care, or bestow his goods, upon children; which are not his; or might on the other hand be wanting in some of those duties to his own children; as not having sufficient evidence, which children she had by him, and which by some other of her husbands. It is strange, that this should be thought a sufficient reason in the nature of the thing to bar the man against allowing the woman a liberty of having more husbands than himself; and yet that a like reason should not be sufficient to bar the woman against allowing a liberty of the same sort to the man. If it is matter of duty in him to secure all the benefits in his power to his own children; it must be as much matter of duty in her to secure all the benefits in her power to her own children; which, as we have already seen, she does not do, if she allows him, whilst she has a right in his person, to have children by another woman.

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What is moſt apt to miſlead us in this enquiry is, that only two perſons are concerned in each ſeparate contract of marriage; for which reaſon we conclude, that they may model the contract, as they pleaſe, without injuring any one: no other perſon is injured by any conditions, which they two agree upon; becauſe no other perſon has any thing to do in the contract, or in any conditions, which relate ſolely to themſelves: and neither of them can be injured by ſuch conditions or reſervations; becauſe they are ſuppoſed to be made with the joynt conſent of them both. If then there is no injury done to any perſon by polygamy, it may be thought impoſſible to prove, that the law of nature forbids it. But in this way of reaſoning in defence of polygamy there is a great miſtake. In order to ſhew, that the law of nature forbids it, there is no occaſion to ſhew, that any perſon is injured in the firſt inſtance by a liberty of practiſing it. Inſtead of attempting to ſhew the unlawfulneſs of it in this method, we compare ſuch a liberty with the notion of the marriage contract; and if we find, that polygamy and the marriage contract are inconſiſtent with one another; the concluſion is, that the nature of this contract ſo forbids polygamy, that the contract of marriage and a liberty of polygamy cannot ſubſiſt together. The conſequence of which is, that though the woman endeavours by her conſent to make the mans ſubſequent marriage lawful, it is not in her power: as the former contract between them two has taken from him the liberty of entering into a ſecond marriage, ſo it has taken from her the power of giving him ſuch a liberty. They muſt either agree to make their former marriage void: or otherwiſe this

this former marriage, if it continues in force, will make his ſubſequent marriage with any other woman a nullity. Whether they could by mutual conſent diſſolve their marriage is another queſtion: but whether they could or not, polygamy would ſtill be inconſiſtent with the marriage contract, and would, by the nature of that contract, be rendered impoſſible: for if they could diſſolve it, then the ſecond woman, that he takes, would be his only wife; and if they could not diſſolve it, he could have nowife beſides the firſt, as long as ſhe lives.

I am aware it may be objected here, that allowing all, which has been urged, to be true, it would only prove the impoſſibility of polygamy, and not the unlawfulneſs of it. But we may obſerve in anſwer to this objection, that if it proves thus much, it proves enough for our purpoſe; it proves that the law of nature does not allow the ſame man to marry a ſecond woman, whilſt his firſt is living and continues to be his wife; and conſequently, that his cohabitation with ſuch ſecond woman, under the pretence that ſhe is his wife, muſt be unlawful. However it is to be remembered, that one of the arguments, by which we have ſhewn, that it is not in the power of the wife, even by her own conſent, to grant the huſband a liberty of polygamy, was taken from the unlawfulneſs of ſuch conſent, from the inconſiſtence of it with the duty to her future children, which duty ſhe undertakes by conſenting to have children: for we ſhewed that her conſent to a condition of this ſort would therefore be void, becauſe it has a continued viciouſneſs adhering to it; as it takes away her power, or ſets aſide her natural obligation, of providing for her children and educating them in the beſt manner that ſhe can.

III.

The caſe of polygamy under the moſaic law, and before it.

III. The authority of the law of Moſes, the practice of the patriarchs, who lived before that law was given, and of the iſraelites, who lived under it, are commonly urged in favour of the natural lawfulneſs of polygamy. It would however be neceſſary for them, who urge the authority of the law of Moſes in this queſtion, to inform themſelves, how far the precept, which they commonly produce as an evidence of its allowing polygamy, relates to this practice. The law ſays, — [r] If a man have two wives, one beloved and the other hated; and they have born him children, both the beloved and the hated; and if the firſt-born ſon be hers, that was hated; then it ſhall be, when he maketh his ſons to inherit that which he hath, that he may not make the ſon of the beloved firſt-born, before the ſon of the hated, which is indeed the firſt-born: but he ſhall acknowledge the ſon of the hated for the firſt-born, by giving him a double portion of all that he hath. — As the law ſeems here to make a proviſion againſt an inconvenience, which might ariſe from the practice of polygamy, they, who favour the natural lawfulneſs of ſuch practice, infer, that the moſaic law muſt have allowed of it; ſince no law can be ſuppoſed to guard againſt the conſequences of any practice, if it did not allow the practice itſelf. But in this inference from the paſſage before us, they planely take for granted, that the beloved and the hated wives muſt both of them be living at the ſame time: whereas neither the words nor the deſign of the law make ſuch a ſuppoſition neceſſary. The inconvenience here guarded againſt might as eaſily happen, and might be as proper to be guarded againſt, if the wife, whom he hated, was

[r] Deuter. XXI. 15. &c.

dead,

dead, before he married the other, whom he loved; as if both of them were alive together. It may be ſaid indeed, that ſuch an interpretation of the paſſage inverts the order, in which the wives are mentioned: for the beloved wife is mentioned firſt in the precept; whereas the interpretation ſuppoſes her to have been the ſecond. But this is a very weak objection: there is no reaſon for ſuppoſing, that the lawmaker, in mentioning the two wives, muſt neceſſarily obſerve the order, in which the man was married to them: nay the fact, as it is here ſtated, ſeems rather to imply, that he was firſt married to the hated wife; for the eldeſt ſon is ſuppoſed to be hers.

This interpretation will appear the more probable, if we compare this precept with another, that is to be found in the ſame law. — 'neither ſhalt thou take a wife to her ſiſter to vex her, to uncover her nakedneſs beſides the other in her life time. — This paſſage is rendered in the margin — Thou ſhalt not take one wife to another &c — And the leaſt acquaintance with the original language will inform us, that the words will very well admit of this marginal tranſlation. Indeed, if we attend to the precept itſelf, we ſhall find, that the beſt rules of interpretation require us to tranſlate it in this manner. The reaſon of the law extends not only to the marriage of the firſt wifes ſiſter, but to the marriage of any other woman, beſides the firſt wife. The reaſon of the law is, that the firſt wife might not be made unhappy. And certainly ſhe would be at leaſt as likely to be made unhappy by his marriage with a woman, who was not at all related to her, as by his marriage with her own ſiſter. If then the obligation of

[s] Levit. XVIII. 18.

the

the law ought to be extended as far, as the reaſon of i extends, we muſt look upon this paſſage as a prohibition of polygamy. Another rule of interpretation is, that a law ought to be underſtood in ſuch a ſenſe, as will give ſome meaning to all the words of it. But if we ſuppoſe this precept to relate only to the marriage of two ſiſters, and the law elſewhere forbids ſuch marriage univerſally, without conſidering whether the former ſiſter is living or dead, the words — in her life time — will have no meaning or a very improper one. Unleſs they imply, that a man, after the death of his wife, might marry her ſiſter, they will have no meaning: and if they imply this, their meaning will be an improper one; becauſe it will make this precept inconſiſtent with what is to be met with in other parts of the law. But if this precept relates to polygamy, the words have a clear meaning; they were added to ſhew, that, though a man might not marry a ſecond wife in the life time of the firſt, yet the lawmaker did not deſign to forbid his marrying a ſecond wife, after the firſt was dead. It muſt be owned indeed, that the law does not elſewhere expreſsly forbid the marrying of a wifes ſiſter, ſuppoſing the wife to be dead; but it forbids ſuch marriage by neceſſary conſequence. In the [t] book of leviticus the ſeveral degrees of conſanguinity and affinity, which bar marriage, are enumerated; and all of them are deſcribed on the part of the man; that is, the law declares, that a man ſhall not marry a woman, if ſhe ſtands in ſuch or ſuch a relation to him. But we may infer by neceſſary conſequence, that whatever degree of conſanguinity or affinity renders it unlawful for a man to marry a woman, the ſame degree would in the in-

[t] Levit. XVIII. 6. 7. 8. &c.

tention

tention of the lawmaker render it unlawful for a woman to marry a man. Thus for inſtance, the law ſays — Thou ſhalt not uncover the nakedneſs of thy fathers or thy mothers ſiſter, that is, a man ſhall not marry his aunt — muſt not we conclude from hence, though the law has not expreſsly ſaid it, that it was equally unlawful for a woman to marry her fathers or her mothers brother, that is, to marry her uncle? In like manner, when the law ſays, — Thou ſhalt not uncover the nakedneſs of thy brothers wife, that is, a man ſhall not marry his brothers wife; — the neceſſary conſequence is, that it muſt be equally unlawful for a woman to marry her ſiſters huſband: becauſe whatever relation there is between a man and his brothers wife, there is juſt the ſame relation between a woman and her ſiſters huſband.

If indeed we were to interpret the law of Moſes by the practice of the iſraelties, who lived under it, we might at firſt ſight be inclined to think, that it had no where forbidden polygamy. But then, if on the other hand we conſider, in how many inſtances their hiſtory informs us, that they neglected to obſerve their law, we ſhall find their practice to be far from a certain rule of forming any opinion about the meaning of the law, ſo as to judge from thence either what that law forbids or what it allows.

The example of the kings of iſrael, in marrying many wives, and in taking many concubines is urged here, not ſo much to ſhew what was generally ſuppoſed to be the tenor of the law upon this head, as to carry us back to the law itſelf, which ſeems to tolerate them in this practice, when it only commands them not to [u] multiply wives: for as multiplying wives

[u] Deuteron. XVII. 16. 17. 18.

 implys

implys taking a great number, a law, which only forbids too great a number, cannot reaſonably be conſtrued to bind them to have no more than one. But whoever attentively reads the paſſage here referred to, will find ſome grounds for believing, that, when the law forbids the king to multiply wives, we are not to underſtand by the word—multiplying—merely the encreaſing of them to too great a number. If this was the true import of the word, what can the law mean, when it goes on to forbid him *greatly* to multiply ſilver and gold? If not multiplying ſilver and gold means not encreaſing them to too great a quantity, the word *greatly* was here added without any meaning at all. [w] A truly learned prelate of our church has abundantly ſhewn, that the law, when it forbids the king to multiply horſes, muſt be underſtood to forbid his keeping more horſes, than was conſiſtent with the ſpirit of their polity. And as they were taught, through their whole law, that their ſtate was under the immediate protection of providence, it was inconſiſtent with a perſuaſion, that God would fight their battles, to carry into the field an army of horſemen, in which the ſtrength of an armed force is ſuppoſed to conſiſt. If we obſerve the ſame rule in interpreting this other command of not multiplying wives, the meaning of it is, that their king was not to have more wives than the law allowed of. So that inſtead of applying this paſſage to ſettle the meaning of the other parts of the law we muſt ſearch the other parts of the law to aſcertain the preciſe meaning of this. By following this interpretation we ſhall ſee why the law forbids the king *greatly* to multiply ſilver and gold. The ſpirit of their polity

[w] Sherlocks Diſſertation IV.

had

had determined, that an armed force of horſemen was not to be brought into the field, and the letter of their law had forbidden a man to take one wife to another. When therefore the legiſlator ſays, that the king ſhall not multiply horſes or wives, the ſpirit of their polity in one inſtance, and the letter of their law in the other, had ſufficiently determined, how far he might go, and where he muſt ſtop in theſe two particulars. But neither the ſpirit of their polity, nor the letter of their law had determined what quantity of riches a man might accumulate: ſomething therefore was in this inſtance to be left to the prudence of the king; the boundary, how far he might go, and where he muſt ſtop, could not be preciſely fixed; he was to take care only, that he did not go too far, and was commanded in general not *greatly* to multiply to himſelf ſilver and gold.

We are told farther, that, when Nathan was ſent to David to expoſtulate with him in the name of God concerning his crime of adultery and murder, in the caſe of Uriah, Nathan amongſt other bleſſings, which David enjoyed, mentions particularly, that God had given him his maſters wives. Grotius takes notice of this as an argument in favour of the lawfulneſs of polygamy under the moſaic diſpenſation: but as he does not explane himſelf, I cannot tell, whether he concludes this fact to make for his purpoſe from the gift of many wives being called a bleſſing, or from Nathans ſaying, that God had given David theſe many wives. As to the number of his wives being called a bleſſing, it affords us no grounds for concluding, that the marrying many wives was agreeable to the ſtrictneſs of the law: becauſe when David was to be reproached

with not being ſatisfyed with what he already enjoyed, it was natural to call that a bleſſing, which he looked upon as part of his happineſs, whether the enjoyment of it was tolerated by the law or not: nay there was more reaſon for reproaching him with it, if it was an indulgence to him, beyond what the law according to the rigour of it would allow; than if it had been a general permiſſion, which the law had granted promiſcuouſly to every one. But if the ſtrength of the argument reſts upon its being ſaid that God had given David thoſe wives; it has but little to ſupport it. Our author, if he had read three verſes farther, would have found, that the enjoyment of what God is ſaid to give is not therefore to be looked upon as lawful, becauſe he is ſaid to give it. God there threatens, that he would give Davids wives to his neighbour, who ſhould lie with them in the face of the ſun. This threatening was accompliſhed, when Abſalom ſpread a tent upon the houſe top, and lay with his fathers wives there. But Grotius, I ſuppoſe would not conclude, that Abſaloms act was lawful, from Nathans having ſaid, that God would give him his fathers wives.

The patriarchs, before the law of Moſes was given undoubtedly practiſed polygamy. But this is no evidence, that the law of nature allows of it; unleſs any one could firſt ſhew, either that the patriarchs were ſo much wiſer, than their contemporaries, as to have traced out exactly all the precepts of the law of nature, or that God had been pleaſed by ſome expreſs revelation to teach them this law in all its branches. Though we ſhould allow, that they were ready to obey this law in all reſpects, as far as they knew it; yet unleſs their own reaſon, or ſome divine revelation had made them

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complete maſters of all its precepts, their practice might in ſome inſtances not be conformable to it. And I know not by what arguments it can be ſhewn, either that the patriarchs had by their own ſkill and application inveſtigated the whole law of nature; or that God, when he was beginning to call mankind to obedience, laid open to them at once all the parts of this law.

Polygamy forbidden by the goſpel.

IV. Before we leave this ſubject, it may not be improper to give the reader a ſhort view of what the goſpel determines upon it. Our ſaviour, though he does not mention and condemn this practice in ſo many words, has ſufficiently taught us, that it is unlawful. [x] He declares, that whoſoever ſhould put away his wife, unleſs for fornication, and ſhould marry another, is guilty of adultery. But if a ſecond marriage, after ſuch divorce, has this character, we may be ſure, that it would not fall ſhort of the ſame character, where there had been no divorce: if it is unlawful to marry a ſecond wife, after the firſt has been put away, it muſt be at leaſt as unlawful ſo to marry, before ſhe has been put away. St. Pauls authority is expreſs to this purpoſe: [y] he commands, that every man, who marries at all, ſhould have his own or his peculiar wife; and that every woman in like manner ſhould have her own or her peculiar huſband. He has likewiſe aſſigned the natural reaſon, why neither the huſband is at liberty to diſpoſe of himſelf to a ſecond wife, nor the wife at liberty to diſpoſe of herſelf to a ſecond huſband, in the life time of the firſt partners of their bed: the reaſon is, that each has an excluſive right to the perſon of the other; the wife, ſays he, hath not power of her own body, but the huſband,

[x] Luke XVI. 18. [y] 1 Cor. VII. 2. 4.

and likewiſe the huſband hath not power over his own body, but the wife.

Divorce forbidden by the law of nature.

V. The ſecond enquiry concerning the marriage contract is, whether the law of nature allows of divorce, or requires, that the contract ſhould be perpetual ſo as naturally to continue during the joynt lives of the parties.

It ſeems to be evident, at firſt ſight, that this contract, like all others, cannot naturally be diſſolved, at the diſcretion of one of the parties, without the conſent of the other; whatever may be the effect, where both of them conſent. As the obligation is produced by their joynt conſent, nothing leſs than a like joynt conſent can deſtroy that obligation: whatever right one of the parties has in the perſon of the other, ſuch right cannot juſtly be taken away without the conſent of the party, whoſe right it is.

I chuſe to take particular notice of this, in order to correct their miſtake, who imagine, that, [z] as divorce was permitted by the law of Moſes, it cannot but be agreeable to the law of nature. Whereas whoever will be at the trouble of looking into that law, and of conſidering it with any degree of attention, will find this permiſſion to be far from deciſive: becauſe he will find, that under the law of Moſes divorce proceeded at the diſcretion and upon the authority of one of the parties. The huſband, if his wife diſpleaſed him, wrote her a bill of divorcement and put her away. I ſhould therefore think it impoſſible to prove from this permiſſion in the law of Moſes, that divorce is in itſelf agreeable to the law of nature: ſince the divorce, which the law of Moſes permitted, is plainly contrary to the

[z] Deuter. XXIV. 4.

law

law of nature. I would not be underſtood to mean, that where ſuch a liberty was allowed to the huſband by ſufficient authority, it would be unjuſt in him to make uſe of it: for certainly when the law had tolerated this practice, the woman, though ſhe did not expreſsly conſent to the divorce, at the time of putting her away, muſt be underſtood, as ſhe knew what the law was, implicitly or tacitly to have conſented to it, at the time of marrying. She was aware, that her huſband had a legal power of putting her away, if ſhe diſpleaſed him; and as ſhe knew the conditions, upon which ſhe made herſelf his wife, ſhe could not but be ſuppoſed to agree to thoſe conditions. By theſe means then, in conſequence of the eſtabliſhed and known toleration, the divorce would in this reſpect become natural; as it proceeded upon the declared intention of the huſband, and upon the implyed conſent of the wife. But what I contend for is, that this toleration itſelf was not natural, or that the law of nature could not grant it. And if divorce, as it was allowed of by the law of Moſes, would, without ſuch an authorized and expreſs toleration, have been inconſiſtent with the law of nature; I know not how any one can infer from the toleration of ſuch a ſort of divorce, that the law of nature allows of divorce. Either this concluſion, as drawn from the moſaic law, muſt be given up; or elſe they, who defend it, muſt go as far as the moſaic permiſſion will lead them, and conclude not only, that a marriage may naturally be diſſolved by the conſent of both parties, but that naturally every woman takes her huſband upon ſuch conditions, that he alone by his ſole authority may put her away, whenever he chuſes it.

One would think indeed, that the authority of

[a] Chriſt was ſufficient to have determined, that no regard was to be had to this permiſſion, in our enquiries, whether the law of nature allows of divorce or not; when he declares, that though Moſes allowed the iſraelites to put away their wives, yet from the beginning it was not ſo, and that this practice was tolerated for no other reaſon, but becauſe they were too ſtubborn to be called back at once, from their long-received cuſtoms, to a full obedience to the will and deſign of their creator.

When we examine this queſtion, concerning divorce, by the law of nature, we muſt conſider in the firſt place what ſort of a contract the ends of marriage make neceſſary; whether they can be effectually obtained by a contract, which will expire of itſelf after a certain time, or may be diſſolved by the act of the parties at any time; or whether they require, that it ſhould be perpetual from the beginning, and incapable of being diſſolved afterwards. For certainly where a man and a woman conſent to be huſband and wife, that is, where they enter into a contract of marriage, the ends, which they muſt, from the nature of the contract, have in view, determine what ſort of a contract it is, that they agree to. If thoſe ends require it to be a perpetual and indiſſoluble one, their conſenting to it for the attainment of thoſe ends implys, whether they expreſs ſo much or not, that they conſent to be huſband and wife for ever. Nay, if the ends of marriage require ſuch a contract, though they ſhould annex to it any expreſs condition of being releaſed, after a certain time, or of being at liberty to releaſe themſelves by joynt conſent at any time; yet ſuch condition would

[a] Mat. V. 32.

be

be void. If they have a will to enter into a contract, which is in its own nature perpetual; they cannot at the ſame time with any effect will any condition, which ſhould make that contract not perpetual. Such a contract and ſuch a condition cannot poſſibly ſubſiſt together.

Now the ends of marriage are the mutual happineſs of the parties, and the production of children. And we are to enquire what ſort of a contract theſe two ends, which the parties contracting have in view, will make neceſſary. [b] Dionyſius Halicarnaſſeus commends an inſtitution of Romulus, by which one ſort of marriage was rendered perpetual, and incapable of being diſſolved: and upon this occaſion he makes an obſervation, which will help to ſhew us, how much the happineſs of the parties depends upon their entering into ſuch a contract as this. "This law, ſays he, engaged the wives, who had no other reſort, to yield a ready compliance to the temper of their huſbands: and it obliged the huſbands on the other hand to treat their wives as a neceſſary poſſeſſion, which they could not on any account relinquiſh." Undoubtedly each party will be more ready to comply with the temper of the other, and to correct likewiſe what is amiſs in their own, when they are under a neceſſity of continuing together for life, than if they had the refuge of a divorce, whenever they grew diſagreeable to one another.

As to the other end of marriage, which is the production of children, it includes in it the duty of maintaining and educating them in the beſt manner, that the parties contracting are able: ſo that they, who engage in a contract of marriage with a view to this

[b] L. II. p. 95.

end,

end, muſt naturally be underſtood to bind themſelves to this duty; the care of educating the future children in the beſt manner, that they can, becomes by marriage the joynt duty of the huſband and wife. But this duty cannot be carried on by their joynt care, unleſs there is an union of affections and intereſt: nor can there be ſuch an union, when they know from the beginning, that at a certain time their mutual affections are to be withdrawn from each other, and their intereſts to be ſeparated: and much leſs can there be any effectual union, when they are at liberty to withdraw their affections from each other, and to ſeparate their intereſts, at any time.

Since then one of the ends of marriage, and the duty, in which the other end of it engages the parties, require that the contract ſhould be perpetual; the conſequence is, that where a man and a woman enter into the contract of marriage, they muſt, from the nature of the act, conſent to make that contract perpetual: becauſe it is abſurd to ſuppoſe, that they have a will to contract for ſuch purpoſes, as require their obligation to each other to be perpetual and unalterable, and yet that at the ſame time they have a will to make that obligation temporary or precarious.

It has I know been enquired, why this contract, as its obligation is derived from the will of the two parties concerned in it, ſhould not, like other contracts, be capable of being diſſolved by the will of the ſame parties. I like a horſe of yours, and as you are willing to ſell him, we agree upon the price: and after we have ſo agreed, you take my money, and I take your horſe. After a few days or weeks are paſt, we are both of us ſorry for having made ſuch a bargain; you are deſirous of having

your

your horſe and I of having my money again. Whatever obligation we were under from the bargain, that had been made between us; if one of us propoſes to ſet it aſide, and the other agrees to this propoſal, as there was no third party concerned in it, and conſequently no one is injured by ſetting it aſide, the effect of our ſo agreeing would be to make the bargain void. Nay ſuppoſe we had gone farther at firſt, and had agreed that the bargain ſhould be perpetual, that the horſe ſhould be mine and the money be yours for ever, that neither of us would at any time make a propoſal of ſetting the bargain aſide, nor either of us accept ſuch a propoſal, if the other made it: the effect would ſtill be the ſame; whenever one of us, though we had agreed to the contrary, ſhould offer to ſet the bargain aſide, and the other, though in oppoſition likewiſe to the firſt agreement, ſhould cloſe with the offer; there would be an end of the contract; and no injury would be done to any one. Why then ſhould not the caſe of marriage be the ſame? A man and a woman agree to give each other a mutual right to one anothers perſons; they agree likewiſe to make this contract a perpetual one: but after they have lived with one another for ſome time, they find reaſon to repent of their bargain, and both of them wiſh to be releaſed: as no third party is concerned in the contract, or injured by diſſolving it; why ſhould not their conſent to releaſe each other, as naturally and as effectually diſſolve this contract, as it would a contract of buying and ſelling? The ſhort anſwer to this difficulty is, that the law of nature, which requires one of theſe contracts to be perpetual, does not require the other to be ſo. For certainly, if the law of nature makes it neceſſary from the firſt, that, when two

parties

parties will marry, the contract of marriage, into which they enter, ſhall be perpetual; the ſame law will for ever continue to forbid them to diſſolve that contract, after they are entered into it. There is an abſurdity in ſaying, that a contract, which is perpetual in its own nature from the beginning, may lawfully be diſſolved at any time by the conſent of the parties, who are engaged in it. But a common bargain of buying and ſelling is not perpetual in its own nature; it is not only made, but modelled likewiſe, at the diſcretion of the parties; and as not only the obligation itſelf, but all the qualities of the contract are the effects of their joynt conſent, a like joynt conſent will change the qualities of it and diſſolve its obligation. The objectors, when they ſuppoſe the buyer and the ſeller to have agreed, that the obligation of their contract ſhall be perpetual, put the caſe as ſtrong as they can: but in the mean time, they do not attend to a material difference between a contract, that is perpetual in its own nature, whether the parties will or no, and a contract, that is made perpetual only by the act of the parties themſelves. A man and a woman are at liberty, whether they will marry or not: but if they will marry, they are not at liberty, whether they will enter into a perpetual contract or not: if they will marry, they contract for ſuch purpoſes, as force them to contract for life. You and I are not only at liberty, whether we will bargain for the horſe or not; but we are at liberty likewiſe, when we are determined to bargain for it, to model our bargain, as we pleaſe, and may either agree or not, that the bargain ſhall ſtand good for ever. Now ſince the former of theſe contracts is perpetual in itſelf, or ſince this quality of being perpetual is neceſſarily connected

nected with and inherent in the contract; it is not left to the diſcretion of the parties, after they have engaged in the contract, to change this quality, by any act of theirs, and ſo to make the contract temporary or precarious. A quality, which was not originally produced, is not liable to be deſtroyed again, by an act of their will. Whereas in the contract of buying and ſelling, the quality of being perpetual is derived wholly from the will of the parties; and becauſe it is derived from thence, and not from the nature of the contract, it may be deſtroyed again, at their diſcretion, by the ſame cauſe, which at firſt produced it.

I have inſtanced in this contract of buying and ſelling, becauſe others, who favour the contrary ſide of the queſtion, have made choice of this inſtance to illuſtrate their opinion. But otherwiſe a contract of partnerſhip, for trade or for any other purpoſe, has a much nearer reſemblance to marriage. However the principle here laid down is equally applicable either to partnerſhips or to buying and ſelling. Though the partners ſhould agree to trade together, they are neither obliged from the beginning by the nature of their contract, to make the partnerſhip perpetual; nor are they ſo far bound to continue in partnerſhip for their joynt lives, as not to be able to releaſe one another by joynt conſent; notwithſtanding they bargained at firſt, that the contract ſhould be perpetual. Becauſe this perpetuity, conſidered as a quality of the contract, is not, like the perpetuity of the marriage-contract, derived from the contract itſelf, and in conſequence neceſſarily connected with it: the perpetuity of partnerſhips, to which the partners agree, is the creature of their own wills, and as it was at firſt produced only by their joynt conſent, ſo

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it may naturally be deſtroyed again in the ſame manner by a like joynt conſent.

In what manner adultery diſſolves marriage.

VI. But though the contract of marriage cannot naturally be diſſolved by the mutual conſent of the husband and wife, yet it happens in this as in all other contracts, that the contract will become void, if either party deprives the other of what ſuch contract has given him or her a perfect right to: where the agreement is broken on one ſide, the obligation ceaſes on the other. Now by the contract of marriage each party has an excluſive right in the perſon of the other for the purpoſes of producing children. Adultery therefore, which deprives one of the parties of this right, or is a breach of the agreement on one ſide, releaſes the other party or makes the obligation void on the other ſide. It is neceſſary however to obſerve, that adultery does not ſo diſſolve a marriage, as to releaſe the adulterer from the bond of it, without the conſent of the injured party. The contract of marriage is in this reſpect like other contracts: however one of the parties may be injured; yet if he knows of the injury, and is willing to ſubmit to it, the contract will remain in force: if he chuſes to continue under his former obligation, the party, who has done the injury, can by ſuch injury acquire no claim to be releaſed from hers.

It is upon this account, that the huſband, if he receives the wife to his bed after adultery, cannot divorce her, till ſome freſh crime of the ſame ſort has been committed. By this act he has ſhewn it to be his deſire, that the marriage ſhould continue: and as the contract, notwithſtanding the adultery, was binding on her part, nothing was wanting, but ſuch a declaration on his part, to re-eſtabliſh it. It may therefore perhaps more pro-

properly be ſaid, that adultery makes a marriage voidable, than that it makes it void: for if no act of the injured party follows the adultery, by which it appears that ſuch party deſigns to be releaſed from the marriage, if the huſband, for inſtance, does not divorce the adulterous wife, but continues to live with her upon the ſame terms, as before the adultery, the contract remains in force.

If wilful deſertion is not allowed to have the ſame effect in diſſolving a marriage, that adultery has; the only reaſon for not allowing it muſt be the difficulty of fixing what is deſertion, without ſome overt act of adultery. This however is certain, that nothing leſs than ſuch a deſertion as is properly wilful and obſtinate can be deemed a ſufficient cauſe for diſſolving a marriage. The wife for inſtance may be forcibly driven away by her huſband, or ſhe may be compelled to leave him by bad uſage, which is in effect a force upon her. And as deſertion in caſes of this ſort is not her voluntary act; it cannot juſtly take from her the right, which ſhe has in his perſon. It is farther neceſſary, that the party, who deſerts the other, ſhould continue obſtinate: becauſe where the wife, who deſerts her huſband, is willing to return to him again; his right in her perſon is not witholden from him, though the uſe of it may have been ſuſpended for a time. And the difficulty of determining, without an overt act of adultery, what deſertion is ſufficient to diſſolve a marriage, reſts upon this point; it cannot well be determined, what length of time, or what refuſals of returning, are ſufficient to make the deſertion obſtinate.

Ill uſage does not make a marriage void.

VII. It is a queſtion, upon which people are much divided, whether ill uſage on either ſide is naturally a ſuffi-

ſufficient reaſon for the party, which ſuffers, to claim a releaſe from the bond of marriage, or to divorce him or herſelf from the perſon, who is the author of ſuch uſage.

Certainly the happineſs of the parties is one of the principal ends, which each of them propoſes in marriage. But this is ſo far from being a reaſon, why ill uſage after marriage ſhould be ſufficient to make the contract void, that it proves the direct contrary; it proves, that the marriage-contract muſt in its own nature be of ſuch a ſort, as is moſt likely to ſecure this end, and that it excludes all ſuch conditions as are likely to prevent this end from being obtained. And if the nature of the contract requires this to be the intention of the parties, they cannot be ſuppoſed at the ſame time to deſign, that the contract ſhould be void, if either party found themſelves leſs happy after marriage, than they expected: becauſe ſuch a condition as this would planely make the happineſs of the marryed ſtate precarious. Whoever wanted to get rid of a preſent wife, that he might be at liberty to marry another, would be ſure to uſe the former ill, that he might by theſe means compel her to give him his liberty. Whereas if ill uſage is likely to occaſion no diſturbance but in his own family, and he is upon that account under a neceſſity of feeling ſome of the effects of it, without being able to bring about any of his private purpoſes; he will be much more likely to uſe his wife well, and to endeavour, as much as he can, to promote her happineſs; when he finds his own ſo cloſely connected with it. But if this is the nature of the contract, then whatever unhappineſs either or both parties may meet with, after they have entered into it, they muſt look upon ſuch

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unhappineſs as a natural misfortune, and muſt either ſubmit to it with patience, or endeavour on each ſide by good behaviour to ſoften the temper of one another, and leſſen or remedy that evil, which they can remedy no otherwiſe, conſiſtently with their contract.

But as the contract itſelf gives each party a right to the perſon of the other, for the purpoſes of producing children, ſo the condition, under which each of them makes over this right to the other, gives each of them likewiſe a right to good uſage from the other; it may therefore be aſked why a violation of the latter right by ill uſage ſhould not have the the ſame effect upon the marriage-contract, that a violation of the former right by adultery would have upon it. In anſwer to this enquiry we muſt obſerve, that the law of marriage in one reſpect is—Thou ſhalt not commit adultery.—The law of it in the other reſpect is — Huſbands love your wives; and let the wife ſee that ſhe reverence her huſband. — The right ariſing out of the former law is a perfect one; becauſe the precept is negative, and the matter of it for that reaſon is preciſe and determinate: whereas the right ariſing out of the latter is imperfect, as the precept is affirmative, and conſequently the matter of it is more vague and uncertain. As there is no medium between committing adultery and not committing it; no one can be at a loſs to determine, when the right, which each party has to the perſon of the other, is violated. But good or bad uſage admits of many degrees; ſome of which are ſo ſlight, that it would be ridiculous to mention them as ſufficient reaſons for diſſolving a marriage. And where there is ſo much latitude, it would be difficult, if not impoſſible,

to ſettle the preciſe degree, which is ſufficient for this purpoſe.

It would be an equitable and a natural temperament in this matter, to relieve the party aggrieved by allowing a ſeparation, without diſſolving the bond of marriage, as far as that bond hinders any ſecond marriage. This is an equitable temperament, becauſe where there is a real grievance, it would be a hardſhip to compel the party aggrieved to live miſerably. And it is a natural temperament; becauſe it is moſt agreeable to the nature of marriage, that the bond ſhould be perpetual, as for other reaſons, ſo for this in particular, that a perpetual bond is, from the firſt, the moſt effectual means of ſecuring to each party good uſage from the other.

A ſecond marriage is a nullity where a former ſubſiſts.

VIII. Having ſeen what will diſſolve a marriage, after it is contracted, we are next to enquire what will make it a nullity from the beginning. One cauſe, which will make it ſo, has been already explaned at large. [c] No ſecond marriage can be valid, whilſt a former marriage is ſubſiſting. A man or woman, under the bond of a former marriage, have no power to diſpoſe of their perſons to any one elſe for the ſame purpoſes: becauſe their perſons are then not their own to diſpoſe of; the right, which they had in them, was made over to the firſt partner of their bed. It is needleſs here to aſk, whether a precontract in words of preſent time will invalidate a ſubſequent marriage of one of the parties concerned in it with any other perſon, beſides him or her, with whom ſuch precontract was made. The law of nature knows no diſtinction between a contract of marriage in words of preſent time and an actual marriage. The formalities, which diſtinguiſh

[c] Grot. Lib. II. Cap. V. § XI.

ſuch

ſuch a contract from what is commonly known by the name of marriage, are of poſitive inſtitution. If a man and a woman have agreed to live together in an union of affections and intereſts, and each of them has given the other a perpetual right in his or her perſon for the purpoſes of producing children; this is naturally a good and valid marriage: and as long as there is no divorce, upon account of adultery, ſuch a contract is ſufficient to ſet aſide all ſubſequent marriages of either of them with any third perſon. A mutual promiſe of future marriage is not an actual making over a preſent right to each others perſons; it is only an agreement, that they will make over ſuch a right hereafter. This too may be called a contract, but then it is only of the promiſory ſort: and any ſubſequent marriage of either of the parties, engaged in ſuch a promiſe, to a third perſon would be valid, notwithſtanding the prior promiſe. For each party has ſtill a right in his or her own perſon; and this will be ſufficient to make the ſubſequent diſpoſal of it binding. The promiſe however is not without its effect; for, as in the caſe of buying and ſelling, it entitles the party, to whom it was made, to all ſuch damages, as may be ſuffered by the breach of it.

We ſaid indeed, in ſpeaking of promiſes, that a promiſe gives a right over the perſon of the promiſer: and ſince an actual marriage conveys no more than a right to the perſon of him or her, who engages in it; we may be aſked what difference there is between a marriage in words of preſent time, and a promiſe of marriage in words of future time. What hinders us from immediately ſeeing the difference is, that in marriage-contracts the perſon and the thing are confounded: if

inſtead of ſaying that a contract in words of preſent time gives each party a right to the perſon, we ſay, that it gives each party a right to the body of the other for the purpoſes of marriage; we ſhall more clearly ſee the difference between ſuch a contract and a promiſory one. A contract in words of preſent time gives each party a right to the body of the other: whereas a promiſory one gives each a right only over the liberty of the other, as to the future diſpoſal of their bodies.

Want of conſummation, in what inſtances it voids a marriage.

IX. The contract of marriage is ſo far complete as to be binding upon the parties, when each has conſented to give the other a preſent right to their bodies reſpectively for the purpoſes of marriage. Conſummation is no more than taking actual poſſeſſion of what by the previous contract each had a right to.

We are however to obſerve, that this contract, like all others, is binding conditionally: ſo that a failure of performance on one part releaſes the obligation on the other part. Impotency therefore on the part of the man, or incapacity on the part of the woman, will ſet the contract aſide. The man and the woman have in words made over a right to their perſons reſpectively for the purpoſes of marriage: but making over this right is in effect making over nothing, where one is impotent or the other incapable.

This ſeems to be what has led ſome to imagine that a marriage is incomplete, till after conſummation. As an impoſſibility of conſummation will ſet the marriage aſide, they conclude it not to be complete by the mere contract. But we have ſhewn already, that it is ſo far complete, as to be binding upon the parties; and that properly the want of conſummation, ariſing from impotency

impotency or incapacity, rather invalidates by non-performance a marriage, that was otherwiſe complete, than makes it a nullity from the beginning by any defect in the marriage itſelf.

However, though the law of nature gives each party a perpetual right to the perſon of the other; it does not determine how long the uſe of that right muſt neceſſarily continue: and upon this account the imperfections, which are ſufficient to ſet a marriage aſide, muſt be from the firſt: whatever imperfections ariſe afterwards will not produce this effect.

X. [d] Marriages between perſons, who are nearly related to one another, either by conſanguinity or affinity, are generally held to be null from the beginning. We call thoſe relations by conſanguinity, who are relations by birth; ſuch as parents and children, brothers and ſiſters, uncles and nieces. Relations by affinity are relations in conſequence of ſome former marriage; ſuch are fathers or mothers in law and their children in law, a man and his brothers wife, or a woman and her ſiſters huſband. Marriages between relations how made invalid.

In our enquiries upon this head, it will be neceſſary to diſtinguiſh between kindred in the direct line, as parents and their children, and kindred in the collateral line, as brothers and ſiſters, uncles and their neices, or aunts and their nephews.

There is a plane reaſon in nature, why marriages, between perſons related by conſanguinity in the direct line, ſhould be void from the beginning. The difference of age, which ſome have aſſigned as the reaſon, is not ſatisfactory: becauſe where the parties are not related one to another, though the difference of age between

[d] Grot. ibid. § XII.

them ſhould be the ſame, as is uſual between parents and their children, or even between grand-parents and their grand-children, ſuch marriage is not looked upon as a nullity. But all acts are void, if the validity of them would ſet aſide the obligation of a law of nature; it being impoſſible to ſuppoſe, that the law of nature can allow what would deſtroy its own authority. Now a marriage, between a mother and her ſon, or a father and his daughter, is not merely contrary to that natural duty of honour, which children owe to their parents, but would, if it was valid, ſuperſede the duty and ſet it aſide: ſuch a marriage would make the children equal to their parents; and the neceſſary familiarities, which marriage ſuppoſes, are wholly inconſiſtent with that reverence, which is implyed in the notion of a childs honouring its parents.

It will be more difficult to find a natural reaſon, why perſons, who are related to one another by affinity, or by conſanguinity in the collateral line, ſhould be under an incapacity of contracting a valid marriage. If we have been brought up from our infancy in an opinion, that it is unnatural for a brother to marry his ſiſter, we ſhall be ſurprized to hear it aſſerted, that no reaſon in the nature of the thing itſelf can be found, which will render ſuch a marriage unlawful; and much leſs can any be found, which will make it void. Our ſurprize however, at hearing this aſſerted, will probably be abated; if we recollect the hiſtory of the creation; from whence we may learn, that the ſons of Adam could have no wives but their own ſiſters. And we cannot imagine, that God would have contrived to place mankind in ſuch circumſtances, as muſt either have put an end to the human ſpecies at once, or elſe have

have laid them under the neceſſity of doing what the law of nature forbids.

Some moraliſts indeed tell us of a natural abhorrence of ſuch mixtures as theſe: they ſay, that every mans own inward ſenſe or inſtinctive feeling is in this inſtance a law to him, and informs him what he may and what he may not do. One would be apt to queſtion whether there is ſuch an abhorrence implanted in us by nature; when we find nothing, which can be called by this name, except in countries where people are bred up in an opinion, that theſe marriages are unlawful: in other countries where the law or cuſtom allows of them, there ſeem to be no traces of any ſuch abhorrence. In fact, if this inſtinct was the only cauſe, why a man might not marry his ſiſter, I do not ſee how ſuch a marriage could in any particular inſtance ever be ſhewn to be unlawful. Whatever other men may feel; it may fairly be preſumed, that the man, who actually marrys his ſiſter, is not ſenſible of any ſuch abhorrence. And however unlawful marriages of this ſort may be ſuppoſed, where the parties have this inſtinct; I ſee not how ſuch an inſtinct, where it is not felt, can make them unlawful. Unleſs the ſenſe or feeling, the deſires or averſions of one man, are the proper ſtandards, by which to regulate the conduct of another.

It is farther urged againſt marriages between two perſons, who are nearly related to one another; that a man enlarges his intereſt by marrying out of his own family: he is already connected with his own kindred; and if he marry with them, it will be of leſs benefit to him, than if he had taken care to create new connections by marrying into another family. This however can be only matter of prudence. The moſt we

could prove from this conſideration is, that ſuch a marriage will ſometimes be leſs beneficial, than another might have been. But it doesnot by any means follow from hence, that the marriage is unlawful. All acts, which are contrary to a mans immediate intereſt, are not for this reaſon to be always looked upon as criminal.

But though we may be at a loſs to find out a natural reaſon, which renders the marriages of perſons related in the collateral line unlawful; yet it ſeems to be very certain, that ſuch marriages are unlawful to all mankind. [e] Theſe inceſtuous marriages are particularly mentioned as a part of the guilt of the caananites, and as one reaſon, amongſt others, why God was pleaſed to caſt them out of their land, and to give it to the children of iſrael. There is not the leaſt reaſon for imagining, that God had ever given any poſitive law about this, or any other matter, to the caananites in particular, excluſive of the reſt of mankind. But if he had not done this, and yet the canaanites were obliged to obſerve ſuch a law, and were repreſented as ſinners for not obſerving it; the plane conſequence is, that this law muſt have been univerſal, ſo as to have obliged all mankind. But becauſe it was an univerſal law before the coming of Chriſt, and yet was no part of the law of nature; it muſt have been a poſitive law given either to Adam or to Noah. Now from the neceſſity, that Adams children were under to marry with one another, we cannot well imagine any ſuch law to have been given to him by the ſame God, who had laid them under this neceſſity, by making no proviſion for them to marry with any one elſe. We muſt therefore

[e] Lev. XVIII. 24. 25. 27.

conclude,

conclude, that ſome poſitive law forbidding inceſtuous marriages was given to Noah, and in him to all his deſcendents.

This obſervation may help to explane a difficulty in the apoſtolical decree upon the queſtion, whether the converted gentiles ought to be circumciſed. The apoſtles determined, that thoſe gentiles were free from the yoke of circumciſion, but required them to abſtain from fornication, from things offered to idols, from things ſtrangled, and from blood. As three of theſe articles forbid things, which are in themſelves indifferent; the difficulty is, why the other article ſhould forbid fornication, which the law of nature had already made criminal. One would expect, that the decree ſhould be uniform, as to the matter of it; eſpecially ſince we ſee no occaſion for the apoſtles to interpoſe their poſitive authority to provide againſt a practice, which was naturally and in itſelf unlawful. [f] Mr. Hooker here refers us to what are called the ſeven precepts of the ſons of Noah, one of which is —"To abhor all unclean knowledge in the fleſh. —This precept he underſtands to relate to unlawful marriages, ſuch as Moſes in the law reckons up; and declares, that for his own part he thinks the apoſtolical canon is rather to be underſtood of theſe, than of fornication, according unto the ſenſe of the law of nature. Words, ſays he, muſt be taken according to the matter whereof they are uttered. The apoſtles command to abſtain from blood. Conſtrue this according to the law of nature, and it will ſeem, that homicide only is forbidden; but conſtrue it in reference to the law of the jews, about which the queſtion was, and it will eaſily

[f] B. IV. § II.

appear

appear to have a clear other ſenſe, and in any man's judgment a truer, when we expound it of eating, and not of ſhedding blood. So if we ſpeak of fornication, he that knoweth no law, but only the law of nature, muſt needs make thereof a narrower conſtruction, than he, which meaſureth the ſame by a law, wherein ſundry kinds even of conjugal copulation are prohibited as impure, unclean, unhoneſt. And [g] St. Paul himſelf doth term inceſtuous marriage fornication."

However it is to be preſumed, that this poſitive law, forbidding inceſtuous marriages, had ſome general convenience attending it. Though ſuch marriages do not appear to do any injury to any one, and conſequently are not naturally unjuſt; though they do not diſqualify a man for doing good, or hinder him from doing it, any more than any other marriage; yet it is to be preſumed, that ſome benefit muſt ariſe from avoiding them, if not to the publick, yet to the individuals, who do avoid them: for we can ſcarce imagine, that what is of no uſe at all, in any view of it, would ever be eſtabliſhed by a divine command. The reaſon of this law is commonly ſuppoſed to be, that near relations live together in ſuch a free and unobſerved manner, as would tempt them to be guilty of much unchaſte practice, if they were not kept, as it were, at a diſtance and checked in their deſires by a law, which forbids them to marry with one another. But it ſeems to be evident, that the moſaic law had ſome other reaſon in view: for it prohibits a man from marrying his ſiſter, [i] whether ſhe was born at home or abroad. Her being born at home implys, that there were opportunities of free intercourſe between her and her

[g] 1 Cor. V. 1. [i] Levit. XVIII. 9.

brother

brother: but her being born abroad implys on the other hand, that there might have been no ſuch opportunities. So that the law in effect ſays—Thou ſhalt not marry thy ſiſter, whether there has or has not been any opportunities of familiar intercourſe; whether thou haſt or haſt not lived with her in a free and unobſerved manner.—It appears to me to be much more probable, that the legiſlator intended, by this proviſion, to leave mankind as free as poſſible to chuſe for themſelves in marriage. A father or mother might conſult ſome particular conveniences of the family, rather than the inclination of their children; and whatever intereſt or caprice determined them to bring about a marriage between two of their children, they would eaſily be able to accompliſh ſuch marriage, if the brother and ſiſter could make a valid marriage: becauſe both the parties are under their authority and direction, and might not only be unduly influenced by ſuch authority, when they were arrived at maturity, but might, even during their minority, be contracted to one another by the act of their parents. Indeed where the parties are children of different parents, their reſpective parents may poſſibly be determined, by ſome intereſt or caprice of their own, to influence ſuch children to engage in a marriage diſagreeable to themſelves. But when the parents are of different families, the parties are not under the authority of the ſame common power; they are each of them under the authority of their own parents only. And as theſe parents have no other common intereſt, but what ariſes from the propoſed marriage; they will be much more likely each of them to conſult the inclination and intereſt of their reſpective children, than to joyn in uſing their authority to drive

their

their children into a marriage, which, as it was diſagreeable to them from the firſt, was likely to end in nothing but miſery.

Force may make a marriage a nullity.

XI. Unjuſt force, if either of the parties are concerned in making uſe of it, will be ſufficient to prevent the obligation of marriage; in the ſame manner as it prevents the obligation of other contracts: becauſe, as in them ſo in this, injuſtice can be no foundation of a right in the perſon, who is guilty of it, and can therefore produce no correſpondent obligation upon the perſon, who ſuffers it. Indeed if voluntary conſummation follows ſuch an extorted marriage, the marriage is then binding: becauſe this is a plane indication, that the perſon, who ſuffered the unjuſt force, is willing to abide by the contract. Conſummation by force in conſequence of ſuch an extorted contract is a rape.

The effects of an error on the contract of marriage.

XII. We have ſeen that ſome errors will be ſufficient to invalidate promiſes or contracts: and what has been ſaid concerning other pacts is applicable to marriage, under ſuch reſtrictions as the nature of this contract requires.

If a man ſtipulates for one woman, and another is impoſed upon him, inſtead of her that he agreed with; ſuch a marriage is voidable at the mans diſcretion: becauſe in fact he never conſented to marry the woman thus impoſed upon him. However, if he acquieſces in the fraud, after it is known, as Jacob did in the caſe of Leah; by ſuch acquieſcence the marriage becomes valid.

Moſt of the other errors, concerning which any queſtion has ariſen, whether they prevent the obligation of a marriage and make it a nullity, will be found up-

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on enquiry to imply ſuch conditions, as are inconſiſtent with the nature of the contract, and cannot therefore either be ſuppoſed to be contained in the contract, if they are not expreſſed, or to produce any effect at all, if they are. Such are the queſtions, how far an error, in regard to the womans fortune, or in regard to her virginity, will make a marriage void. A man may indeed ſtipulate in this form — I conſent to marry you, provided you have ſuch or ſuch a fortune. But then the contract muſt ſtop here, till he has informed himſelf, whether ſhe is worth what he requires or not. He gives her no right to his perſon, and conſequently has no right to hers, till this condition is ſatisfied. But if, without enquiring any farther, he proceeds to act, as if he had a right to her perſon; as he does, if he proceeds to conſummation; he tacitly owns, that ſhe has a right to his: and conſequently by ſo doing he muſt be underſtood to relinquiſh the condition. The marriage therefore will continue in force, notwithſtanding he ſhould afterwards find, that ſhe is worth leſs than he ſtipulated for. If he could have any claim at all, in virtue of the condition, which he originally annexed to their contract, it muſt be a claim to be releaſed from it by divorce. But the law of nature will not ſupport ſuch a claim. For the condition was not, that if you have not ſuch or ſuch a fortune, I will divorce you after marriage; but, if you have ſuch or ſuch a fortune I conſent to marry you, and not otherwiſe. The terms therefore of this condition, however they might juſtify him in not marrying her, would not juſtify him in divorcing her afterwards. And if he was to annex the former of theſe conditions to his contract with her; either ſuch condition would be made void

by

by the nature of the contract; or if the condition was valid, it would make the contract a nullity; as has been ſhewn already, when we were ſpeaking of divorce.

An error concerning the womans virginity, or concerning any natural infirmities, which modeſty or decency will not allow a man to inform himſelf about, till the contract is completed, and each has taken poſſeſſion of the others perſon, cannot hinder that contract from binding, or make it a nullity from the beginning. A man may ſtipulate in this form — I conſent to marry you, provided you are a virgin. — But this condition muſt be expreſſed: for the marriage contract does not naturally imply any ſuch condition. And if it is expreſſed, I do not ſee, that it would hinder the natural effect of the contract, though the man ſhould afterwards diſcover, that ſhe is no virgin: becauſe he muſt not only complete the contract, but muſt give her poſſeſſion of his perſon by taking poſſeſſion of hers, before he can make the diſcovery: and by ſo doing he gives up his conditions, and binds himſelf abſolutely. The form of the ſtipulation did indeed make the marriage conditional; ſo that, as long as ſuch condition remained in force, ſhe could not demand him as her huſband. But before he knew, whether the condition would be ſatisfyed or not, he made himſelf her huſband, and conſequently gave up the condition, by taking poſſeſſion of her perſon. It may however be aſked, whether ſuch an error as this, though it does not make the marriage a nullity, may not be a ſufficient cauſe for a divorce; whether the contract, though it is not void in itſelf, may not upon this account be reſcinded afterwards. In anſwer to this enquiry, we may

ſay

ſay the ſame, that we ſaid in anſwer to the other enquiry, whether an error concerning the womans fortune is a ſufficient cauſe for reſcinding a marriage. It will be a ſufficient cauſe, provided divorce in general is lawful, but not otherwiſe. When other contracts are reſcinded upon account of any error in them; this reſcinding of them is not the ſetting aſide a valid contract, but is the effect of a declaration of one of the parties, that he will not abide by a contract, which from the beginning laid him under no obligation. But we have ſeen, that in the marriage contract conſummation precludes a man from declaring this, notwithſtanding any error either in the fortune or in the virginity of the woman. And conſequently a marriage, where there is ſuch an error, can be reſcinded no otherwiſe, than by ſetting aſide a valid contract. So that, if divorce is unlawful in general, marriages after conſummation cannot be diſſolved, upon account of theſe or the like errors on either ſide. The moſaic law indeed allowed an error in the womans virginity to be a ſufficient cauſe for diſſolving a marriage: but this allowance is conſiſtent with the principles here laid down; ſince we know that the ſame law allowed of divorce in general.

XIII. [k] The full uſe of reaſon is neceſſary in marriages, as in other contracts, to make them binding. So that a marriage contracted between perſons, who are under age, and have not yet arrived at the uſe of reaſon, will be void for want of the conſent of parents. Or if only one of the parties are upon this account incapable of binding themſelves, the marriage will produce no obligation upon the other; becauſe there is no

Want of parents conſent not always ſufficient to make a marriage void.

[k] Grot. ut ſup. § X.

obligation

obligation at all in any contract, unleſs ſuch obligation is mutual. We may here obſerve by the way, that the want of reaſon is naturally ſufficient to make the marriage of an ideot or lunatic a nullity from the beginning.

Where perſons are of full age, the want of their parents conſent does not invalidate a marriage. The law of nature does indeed enjoyn, that children ſhould honour and reverence their parents. For which reaſon it is undoubtedly the duty of children, not only to adviſe with their parents, but likewiſe to let their advice have its due weight, in all affairs of moment. And ſince nothing can be of more moment to the advantage and welfare as well of the family in general, as of the child in particular, than the marriage of the child; it cannot be denyed, that ſuch marriages, as are contracted without the conſent or againſt the commands of a parent, are contrary to the duty of the child; and that conſequently the parent cannot be blamed, if he takes leſs notice of ſuch a child, than he takes of the reſt of his children, and chuſes to diſpoſe of his favours amongſt thoſe, who have been more obſervant of their duty towards him. But then on the other hand marriages ſo contracted are not invalid, provided the child is of a proper age to think and act for itſelf. At this age he has a power of binding himſelf, and is not under the authority of his parents; except in ſuch things, as relate to the intereſts and order of that family, of which he is a member, and of which the parents are the governors. And even this authority ceaſes, as ſoon as he ſeparates himſelf from the family of his parents. The intereſts of the family are indeed greatly concerned in the marriage

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of the children: but then the child is by marriage ſeparated from the family; and thus an end is put to ſuch authority of the parents, as aroſe from this conſideration.

XIV. It does not appear from any thing, which is contained in the contract of marriage, that the husband has any other authority over the wife, than what ariſes from the general preſumption, that he has more ſkill and experience than ſhe has: which is a conſideration, that will make it prudent in her to leave the chief direction of the family to him. And this is no more than what he might expect from her; as ſhe is obliged to contrive for their mutual happineſs, as well as ſhe can: which ſhe does not do, unleſs ſhe willingly commits the management of ſuch affairs to him, as he is likely to manage to greater advantage, than ſhe could. Husbands authority whence it ariſes.

But yet, when it happens otherwiſe; when her ſkill is the greater of the two; it will be equally prudent in him to let her have the management. The ſcriptures have indeed taught us, that the wife is in ſubjection to her huſband; and have given ſuch an account of her duty, as makes it proper for her to promiſe obedience in the very contract of marriage. But then they teach us at the ſame time, that ſuch ſubjection is not her natural ſtate, but was appointed by poſitive inſtitution, as a puniſhment for that crime, into which the firſt huſband was ſeduced by the firſt wife; that it might be a ſtanding leſſon of humility to all future wives, reminding them, that through the weakneſs of their ſex a curſe has been entailed upon the whole ſpecies.

What concubinage is a good and valid marriage.

XV. [1]A concubine, according to the ſenſe, in which the word is now commonly uſed, is a woman, who cohabits with a man without any ſtipulations of conjugal faith. And when by concubinage we mean ſuch a cohabitation as this, it differs little, as to the unlawfulneſs of it, from a vague luſt.

But the ſcriptures uſe the word concubine in ſuch a ſenſe, that thoſe women, who are there called by this name, are ſuch as the law of nature allows to be wives: for as far as appears, they were joined to the man, with whom they cohabited, by a marriage contract, and were no otherwiſe diſtinguiſhed from wives, than either by their own condition or by the condition of their children. If the woman was originally of ſervile condition, and was not raiſed by the marriage to an equal condition with her huſband; and if the children, which ſhe ſhould bear, were underſtood to have no claim to inherit; ſhe was then called a concubine. Thus Hagar, who was of ſervile condition, was Abrahams concubine. She was originally a ſlave; and we find by the authority, which Sarah had over her, that her cohabitation with Abraham had not made her of equal dignity with her miſtreſs. Her ſon Iſhmael was indeed deſigned by Abraham for his heir: but then his claim was founded upon his being adopted by Sarah, and was not derived from the marriage of his mother. In like manner Bilhah and Zilpah were of ſervile condition: and their marriage with Jacob did not change their condition; for they are called handmaids even after their marriage: nor did the children, that were born of them, inherit any otherwiſe than in virtue of their being adopted by Rachel and Leah: for Bilhahs

[1]Grot. ibid. §XV.

children

children were conſidered by Rachel as her own; and ſo were Zilpahs children conſidered by Leah. After marriage they were indeed ſometimes called wives; but it is plane they were not wives of the ſame ſort with Leah and Rachel, not only becauſe they were ſtill ſometimes called handmaids, and becauſe their children were not conſidered as their own, nor inherited in their right; but likewiſe becauſe Jacob had obliged himſelf by oath to Laban not to take any wife beſides his daughters. Bilhah therefore and Zilpah, though they are called wives, ſeem to have been concubines. And from this inſtance, as well from that of Keturah, who is ſometimes called Abrahams wife, and ſometimes his concubine, it appears how little a wife differed from a concubine. As to the eſſential parts of the contract, they ſeem indeed not to have differed at all. Only in the contract with a concubine ſome diſadvantageous conditions were added, in reſpect both of herſelf and of her children. But as theſe conditions were not inconſtent with the contract, the law of nature would not have diſallowed of ſuch concubinage, as we read of in the ſcriptures, if it had not been attended with polygamy.

CHAP. XVI.

Of the right of defence.

I. *Right of defence in what founded.* II. *Indefinite in its extent.* III. *Not confined to injuries.* IV. *How affected by benevolence.* V. *Defence of life.* VI. *Defence of limbs or of chaſtity.* VII. *Defence againſt ſlighter perſonal injuries* VIII. *Honour what.* IX. *Miſtakes in matters of honour, whence they ariſe.* X. *Defence of our goods.*

Right of defence in what founded.

I. AMongſt the other principles, from whence any one man may derive a right over the perſon of any other, I mentioned ſome crime or injury on his part, over whoſe perſon ſuch right is acquired.

[n] Now the rights, which are derived from hence, may be divided into ſuch, as ariſe from an injury before it is committed, and ſuch as ariſe from it, after it is committed.

Thoſe rights, which ariſe from an injury, before it is committed, are called the rights of defence.

The injuries, which any one deſigns to do us, are ſuch as relate either to our perſon or to our property. Of the former ſort are murder, rape, maiming, wounding, ſlander; of the latter ſort are theft, fraud, robbery, burning or otherwiſe deſtroying or waſting our goods. And our natural right of defence is nothing more than the liberty, which the law of nature allows us, of taking ſuch meaſures, as may guard againſt any injuries, which we are likely to ſuffer in our perſons or property. The great queſtion concerning this right of defence is how

[n] Grot. L. II. C. I. §II.

far

far it extends; what liberty the law of nature allows, or what may lawfully be done in order to prevent an injury, which any one deſigns to do us.

[n] Before we can determine any thing with certainty upon this queſtion, it will be neceſſary to enquire into the true principle, upon which the right of defence depends. A right to our life, or to our goods, means no more than a liberty of preſerving them or keeping poſſeſſion of them: we are therefore ſaid to have a right to any thing, becauſe the law of nature does not oblige us to part with it; or becauſe our poſſeſſion of it, and our endeavours to keep ſuch poſſeſſion, are conſiſtent with that law. Now our endeavour to keep poſſeſſion of a thing, when any one attempts to take it from us, is the defence of ourſelves in the poſſeſſion of it: and ſince, where the thing is our own, or where we have a right to it, this endeavour is conſiſtent with the law of nature; it follows, that where we have a right to a thing, our defence of ourſelves in the poſſeſſion of it is lawful; or that a right of defence is implyed in the very notion of our having a right to a thing. In ſhort the true principles, upon which our right of defending either our perſons or our goods depends, is this; the law of nature does not oblige us to give them up, when any one has a mind to hurt them or to take them from us: and that the law of nature does not oblige us thus to give them up, is evident; becauſe our right to them would be unintelligible, or would in effect be no right at all, if we were obliged to ſuffer all mankind to treat them, as they pleaſed, without endeavouring to prevent it.

[n] Grot. ibid. § III.

Right of defence indefinite in its extent.

II. If this then is the principle, upon which the right of defence depends; we cannot expect to find, that the law of nature has exactly defined how far we may go, or what we may lawfully do, in endeavouring to prevent an injury, which any one designs and attempts to do us. [o] The law allows us to defend our persons or our property: and such a general allowance implys, that no particular means of defence are prescribed to us. We may however be sure, that whatever means are necessary must be lawful: because it would be absurd to suppose, that the law of nature allows of defence, and yet forbids us at the same time to do what is necessary for this purpose.

From hence it follows, that he, who attempts to injure us, gives us an indefinite right over his person, or a right to make use of such means to prevent the injury, as his behaviour and our situation make necessary.

Right of defence not confined to injuries.

III. [p] Though we speak of the right of defence, as a right to guard against injuries; the word injuries must not here be confined to its strict and proper sense, as implying some criminal malice in the person, against whom we have a right of defending ourselves. The principle, upon which this right is founded, will extend it to all cases, where we are likely to suffer any causeless harm; even though there is no criminal design on the part of the assailant or of him, who unless we were to prevent it, would be the immediate, though perhaps the innocent, cause of our suffering such harm. For the law of nature no more obliges us to undergo any causeless harm, when it arises from an innocent person, than when it arises from a malicious design: our

[o] Grot. ibid. § X. [p] Grot. ibid. § III.

right

right of defence is not founded in the crime of him, who attempts to hurt us; but in the liberty, which the law allows us, by not obliging us to ſubmit to any harm, which we have not deſerved.

How benevolence affects the right of defence.

IV. Before we go on to apply theſe general principles to particular inſtances, it may not be improper to enquire, whether the right or liberty of defence is not reſtrained by the dictates of benevolence, notwithſtanding there is no precept of ſtrict juſtice, which takes it from us.

If indeed the law of nature had commanded defence, the leaſt degree of patience or ſubmiſſion to any cauſeleſs harm would be criminal. But ſince the defence of our perſon or of our property is juſt, only becauſe it is not unjuſt; ſince we are only allowed and not commanded to defend ourſelves, or to guard againſt injuries; defence ſeems to be a matter of indifference. Will not therefore the regard, which we ought to have for the welfare of others, be a check upon us, and engage us to ſubmit to an injury; as there is no want of injuſtice in ſubmiſſion; rather than ſuffer us to make uſe of the right, which we have over the perſon of him, who attempts to hurt us; as the exerciſe of his right may argue a want of benevolence or compaſſion, a want of that tender regard, which is due to his welfare? This reaſoning will certainly prove to demonſtration, that there is great room for benevolence in the exerciſe of our right of defence; and that proper abatements in the rigour of it, by patience and ſubmiſſion, are by no means inconſiſtent with any precepts of juſtice. But in the mean time; though benevolence may lead us to regulate our right of defence, and to make it as conſiſtent as we can with the welfare of others; we have no

reaſon to imagine that the ſame virtue of benevolence will oblige us wholly to give up that right, or to be ſatisfyed with the uſe of ſuch means of defending ourſelves, as would render it wholly ineffectual. The higheſt degree of benevolence ſeems to be that of loving others as well as ourſelves; of being as tender of their welfare as we are of our own; or of paying an equal regard to an equal degree of happineſs, whether it is our own happineſs, or the happineſs of another man. But even this degree of benevolence cannot require us quietly to give up either our life, or our liberty, or our limbs, or our goods, without endeavouring to preſerve them; merely from the apprehenſion, that he, who attempts to deprive us of them, might ſuffer ſome hurt, if we were to defend them. By ſo doing we ſhould do more than the law of benevolence imports; we ſhould pay a greater regard to his happineſs, than to our own; whereas the law only requires us to pay the ſame. As there is therefore no want of juſtice in ſtanding upon our defence, ſo neither is there in the firſt inſtance any want of benevolence. The conſequences of our doing this may indeed be fatal to him, who attempts to injure us: but then theſe conſequences are chargeable upon himſelf, and not upon us. We only deſire to ſecure what is our own: he ſees what may be the event, if he obſtinately perſiſts in endeavouring to take it from us: and if, notwithſtanding this, he is obſtinate enough to perſiſt, the conſequences muſt be conſidered as ariſing from his own act rather than from ours.

Defence of life.

V. Theſe general principles will perhaps be better underſtood, if we apply them to ſome particular inſtances.

If

[9] If a man is attacked with a plane deſign to kill him; as the law of nature does not oblige him to part with his life, he is at liberty to ſtand upon his defence, and has a right, againſt the aggreſſor, to do whatever is neceſſary for preſerving himſelf from the hurt intended him. If the aggreſſor ſuffers any harm, if he is wounded, or maimed, or killed, this cannot be looked upon as unjuſt or cauſeleſs harm: becauſe he, who did it, was providing for his own ſecurity; he was doing what the law of nature allowed him to do, and killed the aggreſſor, becauſe he could not avoid it. The end therefore was lawful in itſelf, and the means were made lawful by being unavoidable. You may ſay indeed, that the means were not unavoidable, provided he would have conſented to part with his own life. But this is nothing to the purpoſe: for whatever is abſolutely neceſſary for obtaining an end, which the law will juſtify him in purſuing, muſt in the judgment of that law be unavoidable. It might perhaps be poſſible for a perſon, who is thus aſſaulted, to ſave his life by running away from the danger. The aſſailant however has no right to demand, that he ſhould do this. As the law of nature allows the perſon aſſaulted to ſecure himſelf; it leaves him at liberty to judge what means are neceſſary for this purpoſe; whether for inſtance he can preſerve himſelf by running away, or muſt neceſſarily ſtand upon his defence. Benevolence may perſuade him to chuſe that method of providing for his own ſafety, which will be attended with the leaſt hurt to the aggreſſor. But where the danger is inſtantaneous, the mind is too much diſturbed to deliberate upon this head; and if it was more calm, there is no time for deliberation. I ſee

[9] Grot. ibid. § III.

not

not therefore any want of benevolence, which can b reaſonably charged upon a man in theſe circumſtances if he takes the moſt obvious way of preſerving himſelf though perhaps ſome other method might have bee found out, which would have preſerved him as effectu ally, and have produced leſs hurt to the aggreſſor, i he had been calm enough, and had been allowed tim enough, to deliberate about it.

'The danger, which our life is in, may be leſs im mediate; a perſon may have threatened to kill us whenever he meets with a fair opportunity; he may have taken ſome ſteps towards putting this deſign i execution; he may have hired aſſaſſins, or may have laid in wait for us himſelf. In ſuch remote dangers there is more leiſure for deliberation, and the ſugge ſtions of benevolence may be better attended to. But even in theſe circumſtances defence is lawful. If they who live out of civil ſociety, ſhould kill a man, in their endeavours to get ſecurity of him againſt their ſuffering the evil, which they foreſee to be otherwiſe unavoidable, there would be no injuſtice in ſuch defence: and the circumſtances might be ſuch, as would clear the fact from the charge of inhumanity. If the perſon, againſt whom there is this deſign, is morally certain of it; he has a right to demand ſecurity: the public authority would interpoſe and take care, that he ſhould have ſecurity, if he lived in a ſtate of civil ſociety: and if there is no magiſtrate, no public authority, the law of nature will allow him to do, what in a ſtate of civil ſociety the magiſtrate would have done for him; it will allow him to get ſecurity for himſelf, and to make uſe of force in order to obtain it; when it cannot be ob-

[r] Grot. ibid. § V.

tained

tained by any other means. This law cannot be ſuppoſed to oblige a man to expoſe his life to ſuch dangers, as may be guarded againſt, and to wait, till the danger is juſt coming upon him, before it allows him to ſecure himſelf. Whatever degree of aſſurance he has, that he ſhall loſe his life, if he does not take care to guard it; he may reaſonably demand the ſame degree of aſſurance, that the deſign againſt him is laid aſide, and will never be put in execution. His right is only to demand ſuch ſecurity, as is neceſſary for this purpoſe: and if they, whom he had reaſon to be afraid of, will give him it, he can aſk no more. But if they refuſe this, his right ſtill ſubſiſts; and conſequently he may lawfully make uſe of force to compel them: becauſe the right, which he has to be ſecured againſt their ill deſigns, would in effect be no right at all, if he might not ſupport it by all neceſſary means. If then they ſhould make reſiſtance to ſuch force, and in making reſiſtance ſhould be killed, it is their fault, and not his: they loſe their lives not through any want of benevolence in him, but through their own injuſtice. He would have been ſatisfyed with ſufficient ſecurity, that he ſhould not be hurt by them: and if they oppoſe this demand, and are killed in the ſtruggle; there is no breach of juſtice on his part: becauſe he was ſupporting a juſt demand by the means, which they had made neceſſary: and there is no breach of benevolence; becauſe no rule of benevolence requires him to ſet a greater value upon their life, than upon his own; as he certainly muſt have done, if he had expoſed himſelf to their deſigns, rather than endeavoured to obtain ſuch ſecurity for himſelf, as he has a right to.

'It is poſſible, that a man may make an attempt upon my life, and yet be innocent in ſo doing; notwithſtanding I have not deſerved death from him or from any one elſe. He may walk in his ſleep; or he may be out of his ſenſes; or he may miſtake me for ſome one elſe; or he may be employed to fight againſt me in what appears to him to be a juſt cauſe, though it is not ſo. In ſuch caſes as theſe, though he is not chargeable with any crime, I may lawfully defend myſelf againſt him, and may make uſe of all ſuch means of defence, as the circumſtances, that we are in, have made neceſſary. For though we conſider the right of defence as ariſing from a crime, not yet committed, but deſigned and attempted; yet the principle, upon which we ſhew, that there is ſuch a right, extends farther than thoſe caſes, where the aſſailant is properly ſpeaking guilty of a crime. The right which I have againſt the aſſailants perſon, is the liberty, which the law of nature muſt neceſſarily be underſtood to allow me, by not obliging me to bear any cauſeleſs harm; whether there is any crime or not on the part of him, who attempts to do me ſuch cauſeleſs harm.

But ſuppoſe a perſon, without any deſign of hurting me, ſhould happen, when I am aſſaulted by another, to ſtand in my way and hinder me either from making my defence or from providing for my ſecurity by flight; might I ride over him, or puſh him down a precipice, or otherwiſe diſpatch him, in order either to clear the way for my flight, or to remove the hindrance, which he is of to my defence? Certainly this would be unlawful, if nothing but injuſtice, as injuſtice, could give me a right to take away the life of

'Grot. ibid. § III.

another

another man for the preſervation of my own. But if my right of defence, which I have even in caſes of injuries, ariſes from the liberty, which the law of nature allows by not obliging me to ſubmit to any cauſeleſs harm; this principle will extend the right of defence to all caſes, where I am likely to ſuffer any cauſeleſs harm, if I did not take care to uſe the neceſſary means of preventing it. Whatever therefore an innocent perſon may accidentally ſuffer, whilſt I am doing what I am at liberty to do, it muſt be looked upon as a natural misfortune. There is no injuſtice on my part; if he only ſuffers what is unavoidable, without my ſubmitting to what the law of nature does not impoſe upon me. Nor is there any want of benevolence; unleſs benevolence obliged me to have a greater regard to another mans life, than to my own.

Defence of limbs or of chaſtity.

VI. [t] When a man is in danger of being maimed or a woman of being raviſhed; the manner, in which Grotius accounts for the right of defending themſelves againſt theſe injuries, would lead one to imagine, that in his opinion the meaſure of what we may lawfully do, in the defence of our perſon, is to be taken from the evil, which we ſhould ſuffer if we were not to defend ourſelves. The reaſon, which he gives, why the aſſailant may lawfully be killed in ſuch attempts as theſe, is, that one of our principal limbs or our chaſtity is of equal value with our life. As if, upon ſuppoſition, that what we are likely to loſe is not of equal value with our life, it could not lawfully be defended at the expence of his life, who endeavours to take it from us.

But I have already ſhewn, and Grotius upon another occaſion acknowledges, that he, who attempts to injure

[t] Grotius ibid. § VI. VII.

me,

me, gives me an indefinite right againſt him, a right which knows no meaſure, beſides the attainment of the end, for which the law of nature allows it. Since we are not obliged to ſubmit to ſuch injuries, as we have juſt now been ſpeaking of, we are at liberty, that is, we have a right, to defend ourſelves againſt them: and the law, which allows this liberty, cannot be ſuppoſed to forbid any of thoſe means, without which ſuch liberty would be ineffectual.

But the obſervation of Grotius concerning the value of what would be loſt in an attempt to maim or to raviſh, though it is of no weight at all in ſettling the juſtice of defending ourſelves to the utmoſt extremity, may be of uſe to ſhew, that it is not inconſiſtent with benevolence to repel ſuch an attempt at the expence of the aſſailants life: becauſe no rule of benevolence obliges us to love another better than ourſelves; which muſt be the caſe, if we were ready to ſpare his life, though with the loſs of what is of as much value to us, as his life is to him.

Defence againſt ſlight perſonal injuries.

VII. [u] Strict juſtice would allow a man to repel the ſlighteſt injury to his perſon, ſuch as a blow or a box on the ear, by any means, which the aggreſſor makes neceſſary. The principle ſo frequently mentioned already is applicable to this caſe. As the law of nature does not oblige a man to ſubmit even to ſuch injuries as theſe, he is naturally at liberty, or has an indefinite right, to repel them. But where the ſuffering is ſo ſlight to the perſon attacked, and the much greater evil of death would be the conſequence to the aggreſſor, if defence was carryed to the utmoſt rigour of ſtrict juſtice; natural benevolence would teach a man rather

[u] Grotius ibid. § X.

to

to bear the injury, than to ward it off, at ſo great an expence to the aggreſſor, as that of his life.

VIII. * We hear it indeed frequently maintained, that a mans honour will require him to kill his adverſary, if he can; not only that he may ward off ſuch an affront, but even that he may revenge it, after it has been received. And it may not be altogether foreign to our purpoſe to take this opportunity of enquiring into the meaning of the word honour, and into the rules of conduct, which this principle is ſuppoſed to ſuggeſt. Honour what.

It is no very eaſy undertaking to explane a word, which is uſed by all men very unſteadily, and by moſt without any meaning at all. Grotius ſays, that honour is the opinion of our worth or excellence. He does not tell us, whether he means, that any mans honour is the opinion, which the man himſelf has, or the opinion which other people have, of his worth and excellence. In the former ſenſe the definition of honour, as it ſignifies a principle of action, is not true; and in the latter ſenſe it is unintelligible. The true definition of a word may always be ſubſtituted inſtead of the word itſelf. Try therefore to ſubſtitute the definition, which Grotius gives of the word honour, inſtead of the word itſelf; when you affirm, that your honour will not ſuffer you to do ſuch or ſuch an action, or that your honour requires you to do ſuch or ſuch another action. Do you mean, that your opinion, or the judgment which you make, concerning your own worth or excellence, is the principle, which influences you to do or not to do this or that action? If this be the caſe, then every thing is conſiſtent with a mans honour, which he can

* Grot. ibid.

reconcile

reconcile to his own opinion, whatever the reſt of th
world may think, or whatever the rules of right reaſo
may determine about it: and a man, who had debaſe
his mind and corrupted his judgment, would eaſi
prove to you, that cowardice and treachery are as co
ſiſtent with a principle of honour, as courage or fidelit
Grotius however, when he ſpeaks of honour as conſi
ſting in the opinion of our worth and excellence, di
not mean a mans own opinion of theſe qualities i
himſelf, but the general opinion of mankind concer
ing them. But if honour has ſuch a reference to th
opinion of others, as this definition ſuppoſes, it wi
be nonſenſe for a man to talk of his own honour, un
leſs we add ſomething to the definition, which wi
give it likewiſe a reference to himſelf. If it is conſidere
without any ſuch reference to himſelf, merely as th
opinion of other men, he cannot ſpeak of it as a princip
within his own heart. If we call it a ſenſe of the eſteem
or regard of mankind, a deſire of raiſing and preſe
ving in them an opinion of our worth and excellence
the definition will be intelligible. And I will endeavou
to ſhew, that this is the true notion of honour, as fa
as the word is uſed with any ſteady meaning, or wit
any meaning at all.

When the word honour is made uſe of by thoſe, wh
call themſelves men of honour, to denote a principle o
action, which influences their conduct; if any analog
of language is obſerved, or if it ſignifys any thing lik
what the ſame word is uſed to ſignify upon other occa
ſions, we may judge what this principle is by attend
ing to the import of ſome very common expreſſions.
What do we mean, when we ſay, that we honour a
man? The plane ſenſe of ſuch an expreſſion is, tha
we

we think highly of him, or that we regard and eſteem him. What is it then to behave honourably, but to behave in ſuch a manner, as to deſerve to be honoured; that is, in ſuch a manner, as to deſerve the regard and eſteem of mankind? Now there ſeems to be no difference between behaving honourably, and behaving with honour: ſo that to behave with honour, and to behave in ſuch a manner, as to deſerve the regard and eſteem of mankind, are the ſame thing.

If this is the fundamental rule of honour, it will be eaſy to ſee what principle it is, which puts a man upon obſerving ſuch a rule. Nothing but a deſire, that mankind ſhould think well of us, or a ſenſe of reputation, can lead a man to behave in this or that manner, merely becauſe mankind will eſteem and regard him for ſuch behaviour. One would think, that ſuch a principle of action as this could ſeldom miſlead us: becauſe the general opinion of mankind, though it is not a demonſtrative ſtandard, muſt be allowed to be at leaſt a probable ſtandard, of what is right and virtuous. General opinion is nothing elſe, but the common ſenſe of mankind, or the common judgment of reaſon: and it is not likely, that mankind ſhould univerſally approve any thing, which is generally hurtful, or any thing indeed, which is not generally beneficial.

Miſtakes in matters of honour, whence they ariſe.

IX. The miſtakes in this matter ariſe either from our making uſe of a wrong ſtandard in judging what is honourable, or elſe from our applying the true ſtandard in a wrong manner.

We make uſe of a wrong ſtandard, whenever our ſenſe of reputation is confined to a few, and does not extend itſelf to all; whenever we deſire to be thought well of by a ſmall party of men, inſtead of deſiring to

be thought well of by mankind in general. A few men may eaſily be miſtaken in their judgment, a ſmall party may be determined, by caprice or private intereſt, to regard and eſteem us for ſuch qualities or ſuch conduct, as would make the reſt of mankind think meanly of us. And in fact there is ſcarce any conduct ſo ſcandalous, but ſome will be found to countenance and encourage it. If then we mean by our honour only a ſenſe of reputation amongſt the few, that we converſe with, amongſt people, whoſe humour or intereſt is the ſame with our own; it is no wonder, if honour and virtue ſhould ſometimes be found to differ from one another. But this notion of honour is plainly a partial one, and may for that reaſon be juſtly called a falſe one. He cannot be ſaid to act upon a true principle of honour, who is eſteemed or thought well of by only an inconſiderable number of men; whilſt he appears to the reſt of the world to act meanly or baſely.

Suppoſe however, that we make uſe of a true ſtandard of honour, and look upon no actions to be conſiſtent with our honour, but ſuch as are in general eſteem; we may poſſibly be miſled in our judgment by a partial application even of this ſtandard. If an action conſiſts of ſeveral different parts, or may be conſidered in ſeveral different views; ſome one part of it, taken ſeparately from the reſt, may deſervedly be had in general eſteem; the action, when we view it only on one ſide, may be ſuch as mankind would approve, that is, it may be ſuch as a true principle of honour would ſuggeſt. And whilſt we attend to this part of the action, or whilſt we conſider it in this ſingle view, we may look upon it to be conſiſtent with

our

our ſtandard of honour: whereas, if we had attended to all the parts of the action, or had viewed it on all ſides; we ſhould have ſeen ſuch a mixture of meanneſs or baſeneſs in it, as would have convinced us, that it could never either obtain or deſerve a general eſteem, and that no ſenſe or deſire of approving ourſelves to the common judgment of mankind could ever lead to it. The ſame partial application of the ſtandard of honour, which miſleads us in judging of actions, miſleads us likewiſe in judging of the characters of men. We attend ſo much to ſome ſtriking part of their conduct, as not to obſerve the reſt of it. — And it is only by this means, that many have had the credit of being men of honour, who, if their whole conduct had been as much attended to, would have been found to deſerve contempt, and would juſtly be ranked amongſt the meaneſt and baſeſt of the ſpecies.

There is one very common miſtake about the notion of honour, which may perhaps not be thought to ariſe either from the uſe of a partial ſtandard of honour, or from a partial application of the true ſtandard. The miſtake, which I mean, is, that courage and honour are by many people looked upon as one and the ſame thing. Men, who are ſoon provoked, who carry their reſentment upon the ſlighteſt occaſions to the utmoſt extremity, and are prodigal of their lives to gratify their revenge, have aſſumed, and would appropriate to themſelves, the title of men of honour; though they have ſcarce any one good quality, that can give them any pretenſions to it. The caſe ſeems to be this: men of true honour, that is, men, who have a ſenſe of eſteem, and a deſire to obtain the general

good opinion of mankind, are tender of their reputation, and make it a principal part of their happineſs to behave in ſuch a manner, as to deſerve to be well thought and well ſpoken of. Upon this account they cannot bear to have their character leſſened, and would rather hazard their life, than ſubmit to any cauſeleſs aſperſion. Thus as a true principle of honour naturally produces courage, or as men of true honour are commonly men of courage; the quarrelſome and the revengeful have miſtaken the matter, and have imagined, that the converſe muſt be true too, that men of courage muſt be men of honour. They have this advantage on their ſide, that no prudent man chuſes to call their title to this character into queſtion: and they are therefore weak enough to pleaſe themſelves with fancying, that their title is a good one. Courage indeed is in ſome ſtations of life an uſeful part of a mans character. A ſoldier could not diſcharge the duties of his ſtation, if he did not maintain a general opinion of his being poſſeſſed of it. The rule of benevolence would ſcarce diſſuade a man, who is placed in ſuch circumſtances, as make courage a neceſſary or valuable part of his character, from doing what juſtice allows of, if he could not avoid doing it without a general imputation of cowardice: not becauſe the law of benevolence does not bind him, or does not command him, as well as other men, to ſacrifice his own leſſer happineſs to the greater happineſs of another; but becauſe the good, which he is enabled to do in his ſtation by preſerving the reputation of courage, is greater than the good, which he would do by ſubmitting to injuries; where he cannot ſubmit to them without forfeiting that reputation. But if they, whoſe ſtation and cir-

circumſtances have not made courage a neceſſary or uſeful part of their character, will reſent or guard againſt ſlight affronts with the utmoſt rigour, that ſtrict juſtice will allow of; it is their buſineſs to conſider, how well they comply with the natural dictates of benevolence; it is much too difficult a taſk for me to undertake.

Defence of our goods.

X. As the law of nature does not oblige us in ſtrict juſtice to part with our lives, or our limbs, or our chaſtity, and does, by not obliging us to part with them, allow us to defend our perſons; [x] ſo neither does it oblige us to give up our goods to thoſe, who would unjuſtly rob us of them. And from this natural liberty of keeping our goods, in oppoſition to thoſe, who would unjuſtly take them from us, our right of defence ariſes, that is, our right over their perſon, as far as ſuch a right is neceſſary for preventing their attempt.

It is plane from the foundation of this right, that it muſt be an indefinite one, or that we are not naturally debarred from proceeding to extremities in the defence of our goods; where the obſtinate injuſtice of ſuch, as would take them from us, makes this behaviour neceſſary. For as the law of nature does not oblige us to part with our goods, it cannot be ſuppoſed to preſcribe any particular means of defending them: ſince to preſcribe ſuch means, as the only lawful means, would in effect be obliging us to part with our goods, when thoſe means fail. And ſuch injunctions, as theſe, would planely make property nothing, or would give all perſons, who had a mind to deprive us of our goods, a power of doing ſo; provided they only took care to

[x] Grot. ibid. § XI.

render the preſcribed means ineffectual for the ſecurity and preſervation of them.

Grotius indeed, in order to juſtify killing a man in defence of our goods, obſerves, that the inequality of value between his life and our goods is made up by the favour of the law towards our innocence, and its averſion towards his injuſtice. But he was led to think this obſervation neceſſary by a principle, from which he reaſons elſewhere upon a like queſtion: it ſeems to have been his opinion, that the evil, which the law of nature allows us to do in our own defence, ought not to exceed the evil, which we ſhould ſuffer, if we were not to defend ourſelves. This principle has already been ſhewn not to be true: and it is the more to be wondered at, that Grotius ſhould proceed upon it, ſince in ſpeaking of what may be lawfully done in defence of our perſons, he maintains, that they, who attempt to injure us, give us, by ſuch an attempt, an unlimited right againſt them; as far as ſuch a right is neceſſary for preſerving ourſelves from the harm, which they deſign to do us. And it is plane from hence, that he was aware both of the true foundation of our right of defence, and of the true extent likewiſe of this right.

[y] But he had a favourite principle in his mind, that we ought not to take away any ones life immediately or directly for the ſake of preſerving our goods. He allows however, that we may defend them, till our own life is in danger, and then we may juſtly kill the robber: becauſe in theſe circumſtances, the robber loſes his life, immediately or directly for the ſake of preſerving our own life, but remotely only, or indirectly, for the ſake of preſerving our goods.

[y] Grot. ibid. § XIII.

Upon

Upon this principle, as he imagines, we are to account for the diſtinction, which the laws of Moſes, of Solon, of Plato, and of the twelve tables have made between a theif, who robs in the day, and a theif, who robs in the night; when they allow the latter to be killed, but forbid killing the former. Witneſſes, he ſays, can ſcarce be ſuppoſed preſent in the night, to explane how the death of the thief happened: and for that reaſon the law ſuppoſes favourably, that the perſon, who killed the theif, did not do it merely for the ſake of preventing the loſs of his goods, but that, whilſt he was defending his goods, his life was brought into danger, and that he was forced to take this method of preventing himſelf from being killed. Whereas in the day-time there can be no room for ſuch favourable preſumption: when others are preſent or could readily come in, if they were called for; it would eaſily appear, whether the perſon, who kills the theif, was in danger of his life or not: and ſince the law, when witneſſes are to be had, preſumes no more in his favour than he can make out, it forbids the killing a theif ſo robbing in the day-time, becauſe it intends, that no man ſhould loſe his life directly for the ſake of preſerving anothers goods.

The allowance, which theſe laws granted to kill a theif in the night, can ſcarce be reconciled with what Grotius here ſuppoſes to be the intention of the law-givers. But in order to reconcile ſuch an allowance with ſuch an intention, he makes uſe of ſeveral arguments to ſhew, that thoſe laws preſumed the perſon, who killed a night-theif to be in danger of loſing his own life. The chief of theſe arguments depends upon what he obſerves concerning the law of Moſes, that it

required the theif to be found with ſuch an inſtrument as is uſed in ſtabbing: and urges, that if the law allowed him to be killed, only when he was found ſo armed, it muſt in this permiſſion proceed upon the preſumption, that he attempted to make uſe of the weapon, with which he was found. But ſuppoſe inſtead of calling the inſtrument, with which he was found, an inſtrument for ſtabbing, we were to call it an inſtrument for breaking through; this evidence for the preſumption, which Grotius ſuppoſes the law to proceed upon, will be taken away at once: no one from finding that the thief brought with him a crow-iron, or a file, or a ſaw, or any other inſtrument of this ſort, which might help him in getting into the houſe, would think this any evidence, that he had been making an attempt upon the life of the maſter of ſuch houſe. And perhaps after all, the word, which Grotius tranſlates an inſtrument for ſtabbing, and which I have tranſlated an inſtrument for breaking through, may be very properly rendered by our engliſh tranſlators, when they deſcribe the theif as being found, not with any particular ſort of weapon, but in the act of breaking through.

However without being at the trouble of examining into this nicety, we need only read the words of the law in order to inform ourſelves of the reaſon, upon which it proceeded in making a diſtinction between the two ſorts of theives. [z] The law ſays, — "If a theif be found breaking up, and be ſmitten, that he die, there ſhall no blood be ſhed for him: if the ſun be riſen upon him, there ſhall be blood ſhed for him; for he ſhould make full reſtitution." The plane reaſon, why

[z] Exod. XXII. 2.

the

the law did not allow a day-theif to be killed, is here given: he ought not to be killed, becauſe he ſhould have made full reſtitution. The law had an opportunity of coming in to aſſiſt a perſon, who was robbed in the day-time, and of taking care that proper juſtice ſhould be done between him and the theif. And if this was the reaſon, why a day-theif was not allowed to be killed, we may eaſily infer from thence what was the reaſon, why this was allowed in the caſe of a night-theif: the ordinary penalty of theft could not readily be inflicted; and men might therefore be encouraged, by the hopes of impunity, to ſteal in the night-time, if ſome other method was not made uſe of to deter them. With this view the law, when it could not come in to a perſons aid, left him to his natural liberty, and gave him leave to defend himſelf, by whatever means he ſhould find to be neceſſary.

It may here be aſked, why the law of Moſes, which did not puniſh theft with death, if the theif was taken, ſhould indulge private perſons in a licenſe of proceeding farther than it would proceed itſelf. [a] Puffendorf affirms in general, that none of thoſe lawgivers, who permitted a night-theif to be killed, decreed any capital puniſhment againſt theft, if the theif was taken. This however, though it is true of the moſaic law, is certainly not true of all the reſt. The law of the twelve tables decreed a capital puniſhment againſt a ſlave for theft. And the laws of Solon made theft capital, where the value of the thing ſtolen exceeded fifty drachmas, or where the theft was committed in a bath, or in a place of exerciſe; that is, where perſons laid aſide their cloaths or other things of value, which they uſually

[a] B. II. Cap. V. § XVII, XVIII.

carry

carry about with them, and were otherwiſe employed, ſo as not to be upon their guard, it was capital to ſteal.

We may from hence make two obſervations in paſſing. Firſt, when the law of the twelve tables, or Solons laws allow a perſon to kill a theif in the night, but forbid the killing a theif in the day; the lawgivers could not proceed in this latter prohibition upon the principle, which Grotius imagines them to have had in view, the principle of not taking away any ones life directly upon account of our goods: becauſe the roman law puniſhed theft in a ſlave, and Solons law puniſhed theft of goods to a certain value and in certain circumſtances, with death. And if the lawmakers proceeded upon no ſuch principle, it will be difficult to ſhew, that, in the former permiſſion of killing a night-theif, they proceeded upon the preſumption, that ſuch a theif was killed, whilſt the perſon, whoſe goods he was endeavouring to ſteal, was brought into danger of his life.

Our ſecond obſervation relates to that part of Solons law, which puniſhes theft in a bath with death, and to the apparent reaſon of this law, which has been already aſſigned. Where the owners of the goods ſtolen are not upon their guard, nor can be ſuppoſed to be ſo, the penalty of theft is greater, than where goods of the ſame value are ſtolen in other circumſtances.

We may apply this to the caſe of a night-theif. Men are leſs upon their guard, and are leſs able to take care of their goods in the night than in the day. It was neceſſary therefore for the law to give them a better ſecurity againſt being robbed in the night, by making the conſequence of ſuch theft more dangerous, than the con-

conſequence of ſtealing in the day. And this ſeems in general to be a prudent rule in making laws, to guard againſt ſuch crimes, as are moſt eaſily committed, by the higheſt penalties; and to take care, that the ſecurity, which is wanting in the nature of the thing, may be ſupplyed by the ſeverity of what the law threatens.

This leads us to the true anſwer to that enquiry from whence we have digreſſed. The law of Moſes, though it does not puniſh theft with death, where the circumſtances are ſuch, as to give the injured perſon what the law calls full reſtitution; yet in other circumſtances it grants the beſt ſecurity, that it could, by allowing the injured perſon to defend his goods as he can. What the moſaic law ſays concerning a night-theif cannot properly be called the eſtabliſhment of a penalty: it only leaves a man in this inſtance to his natural liberty. In the caſe of a day-theif the law appoints a certain penalty, forbids the perſon, upon whoſe goods the attempt is made, to kill the theif, and declares him to be guilty of murder, if he kills him. But in the caſe of a night-theif, it does not command, that he ſhould be killed, but only ſays, that, if he ſhould be killed, no notice ſhall be taken of it. In reſpect then of a day-theif the natural right of defence is abridged by the law; but in reſpect of a night-theif, the words of the law are merely permiſſive, and may be looked upon as a declaration, that every man was at liberty to defend his goods againſt ſuch a theif, in any manner, that he pleaſed.

If we conſider the law, as it relates to a night-theif, in this view, that is, as a ſimple permiſſion, it will lead us to conclude, that the author of the law of Moſes looked

looked upon the defence of our goods, even at the expence of the life of the theif, as conſiſtent with the law of nature. The law gives a man no authority to kill a night-theif, which he would not have had, if no law had been made about a theif of either ſort: it only ſuppoſes, that ſuch a theif may happen to be killed, and then declares, that the man, who kills him, ſhall not be puniſhed for it. As this is a ſimple permiſſion, it leaves men to the liberty of nature: and as the law exempts the perſon, who thus defends his goods, from any puniſhment; it planely ſhews what ſort of defence was looked upon by the lawmaker to be juſtifiable, where men were left to that liberty.

Since then ſuch a defence of our goods, as may end in the death of him, who endeavours to take them from us, has been ſhewn to be conſiſtent with natural juſtice; the only remaining enquiry is, whether it is conſiſtent with benevolence, or whether, for the ſake of preſerving the life of the robber, we ought not in tenderneſs to his welfare, though not in ſtrict juſtice, to part with the goods, which he endeavours to deprive us of. But the queſtion, when it is thus ſtated, does not take the matter far enough back. The firſt enquiry ought to be, whether benevolence, or a tender regard to the welfare of the robber, obliges us rather to part with our goods, than to defend them at all: becauſe all the conſequences of ſuch defence are to be charged to his account, and not to ours: it ariſes wholly from himſelf and not from us, that the loſs of his life ſhould come in competition with the loſs of our goods. If the preſervation of our goods was in the firſt inſtance conſiſtent with benevolence, and we take no other meaſures to preſerve them, than what his violence, or the manner of his attack upon

on them, makes neceſſary; whatever event may happen to follow, from our defence of them, it muſt be conſidered as his act, who puſhes us to extremities, and not as ours, who had no deſign of doing more, than benevolence would have warranted. Suppoſing therefore the matter in queſtion to be of no great importance to our happineſs, but to be ſuch as we can well ſpare, without any conſiderable damage either to ourſelves or to thoſe, whom we are bound in duty to take care of, and to provide for; benevolence would perſuade us to ſacrifice it to mutual peace, to part with it rather than to engage in any contention about it. But if we are in danger of being plundered of all, that we are worth, or of loſing what is neceſſary to our own happineſs, and to the proper diſcharge of that duty, which we owe to our relations and dependents; benevolence, which not only teaches us to ſhew our firſt kindneſſes to them, who have deſerved the beſt of us, but which requires no more of us towards any one than to love him, as well as we love ourſelves, would not oblige us to part with it.

We find, that even the goſpel, when it commands us not to reſiſt injuries, has explaned this precept in ſuch a manner, as to ſhew, that we are to underſtand it of leſſer injuries only. [b] "If any man will ſue thee at the law, and take thy coat from thee, let him have thy cloke alſo." Though the precept, not to reſiſt injuries, is delivered in general words, the inſtance made uſe of to explane it is an evidence, that he, who gave it, did not deſign to extend it to all inſtances of property. If he had illuſtrated his meaning by inſtances of the higheſt injuries, we might have been ſure, that the

[b] Matt. V. 40.

precept

precept included all leſſer injuries: but as he choſe to illuſtrate it by an example of a ſlight loſs, there is by no means the ſame ground for concluding, that he deſigned to include all greater loſſes.

One thing however benevolence ſeems ſtrongly to recommend to us, which is to give the robber as good notice, as we can, and as the diſturbance, into which he throws us, will permit us to give him, that we are determined to defend our property by all ſuch means, as he ſhall make neceſſary: and when we have done this; if he perſiſts in his deſign, the fault will be entirely his own, and no want of kindneſs to him can reaſonably be charged upon us, whatever may be the conſequence of his violence.

The liberty of defence, which we have now been explaning, is greatly abridged, where the parties concerned are members of the ſame civil ſociety. But I ſhall defer conſidering in what manner it is abridged, till I come to ſpeak about the nature of civil ſociety, and of the effects, which are produced in our natural rights, by the inſtitution of it.

CHAP.

CHAP. XVII.

Of Reparation for damage done.

I. *Damage and fault, what they mean.* II. *Right to reparation, whence it ariſes.* III. *Imperfect right, no foundation for demanding reparation.* IV. *Perfect and imperfect rights are ſometimes confounded.* V. *Some rules to be obſerved in eſtimating damages.* VI. *Acceſſaries to an injury obliged to make reparation.* VII. *Damages how to be demanded from a number of principals.* VIII. *Reparation due for the conſequences of an unlawful act.* IX. *Reparations for unjuſt death.* X. *For maiming, wounding, beating, unjuſt impriſonment.* XI. *For adultery, or for debauching a woman.* XII. *For theft.* XIII. *For ſlander.* XIV. *Reparation due, where there is no malice.*

Damage and fault what they mean.

I. AN [c] injury, after it is committed, produces a right in them, who have ſuffered any damage by it, to demand reparation of ſuch damage, from the authors of the injury; and it produces likewiſe a right of inflicting puniſhment.

[d] By damage we underſtand every loſs or diminution of what is a mans own occaſioned by the fault of another. And by a fault we underſtand every unlawful action or omiſſion.

It is proper to obſerve here, that though every unlawful act or neglect is a fault; yet every ſuch act or neglect does not lay the perſon, who is in fault, under an obligation to make reparation: no ſuch obligation is produced, unleſs the fault occaſions ſome damage,

[c] Grotius ut ſup. § II. [d] Grot. Lib. II. Cap. XVII. § II.

that

that is, unleſs it occaſions ſome loſs or diminution of what ſome other perſon has a ſtrict right to. A man is chargeable with a fault, that is, he is chargeable with behaving unlawfully, whenever he does not comply with the law. But in many inſtances he may behave unlawfully, and yet be under no obligation to make reparation to any one. All actions or omiſſions, which are contrary to the ſeveral duties included in the general virtue of benevolence, are faults; but ſuch faults as theſe give no perſon any right to demand reparation. The notion of reparation is unintelligible, where no damage has been done: and whatever want of benevolence there may be, in not giving to a man what he had reaſon to expect, or what he had an imperfect right to; there can be no damage in it: becauſe damage is ſome loſs or diminution of what is ſtrictly and properly his own.

It is to be obſerved farther, that the definition of damage extends the notion of it beyond a mans goods. His life, his limbs, his liberty, an exemption from pain, his character or reputation, are all of them his own, in a ſtrict and proper ſenſe: ſo that the loſs or diminution of any of them gives him a right to demand reparation from thoſe, by whoſe fault they have been loſt or diminiſhed. Nor is the notion of damage confined to the loſs or diminution of ſuch things, as are a mans own by the immediate gift of nature, or by ſuch a general compact of all mankind, as that is, which introduced property. It is a damage to him, if he ſuffers any loſs or diminution of ſuch things, whether corporeal or incorporeal, as any particular compact or any poſitive laws may have made his own. Thus a ſervant by witholding the ſervice, which his bargain

bargain has given his maſter a right to, does damage to his maſter. And a guardian by neglecting to take ſuch care of the affairs of his ward, as either the nature of the truſt, which he has undertaken, or the poſitive laws of his country oblige him to, does damage to ſuch ward.

Right to reparation, whence it ariſes.

II. As the law of nature forbids us to hurt any man, it cannot allow any act of ours, whereby another is hurt, to ſtand good, or to obtain any effect. But the law, if it does not allow ſuch act to ſtand good, or to obtain any effect, muſt, after we have done it, require us to undo it again. The only way of undoing it again, or of preventing the effect of it, that is, the only way of ſatisfying the law, is to make amends for what any perſon has ſuffered, who was hurt by it, or to make reparation for the damages, which ſuch perſon has ſuſtained. The ſame law therefore, which guards a man from being hurt, by requiring others not to hurt him, gives him a demand upon them, when they have done him any hurt, to undo it again, or gives him a right to demand reparation of damages.

If ſuch reparation is refuſed, the law, which gives him a right to it, allows him to ſupport this right by all ſuch means, as are neceſſary for that purpoſe: becauſe a right, which he is not at liberty to enforce and bring into execution, is in effect no right at all. He therefore, who has ſuffered any damage by the fault of another, may, conſiſtently with the law of nature, by the uſe of his ſtrength, that is, by force, endeavour to obtain ſatisfaction by making repriſals upon the perſon, who has done the damage, to the value of what he has loſt.

We have already ſeen by what means and upon what account the property in ſuch things, as are ſo taken in repriſal, will be transferred from their former owner to the perſon, who takes them.

Imperfect right no foundation for demanding reparation.

III. [c] An imperfect right, as was juſt now obſerved, can be no foundation of a claim to reparation. We cannot properly be ſaid to ſuffer damage in what is not our own: however reaſonable our expectations of receiving a thing or a ſervice may be, the moſt we can ſay, where they are refuſed us, provided they were matter of favour and were not due to us in ſtrict juſtice, is, that we are hardly or unkindly uſed. Indeed in common language, a man, who is very hardly or very unkindly uſed; who meets with no reward or encouragement of his merit from ſuch, as ought to reward or encourage him; who is not relieved in his diſtreſs by ſuch, as ought to relieve him; is ſaid to be injured, or not to have juſtice done him. We ſometimes go farther, and ſay, that his merit or his ſufferings give him a claim to ſuch or ſuch inſtances of encouragement and aſſiſtance. But when we make uſe of theſe or the like expreſſions, upon occaſions of this ſort; the words, injury, or juſtice, or claim, muſt not be underſtood in their ſtrict and proper ſenſe. Nothing is due to a man in ſtrict juſtice, he has no ſtrict and proper claim to any thing, but what is his own: and whatever pretenſions either his merit, or his ſufferings, may give him to the favour and aſſiſtance of others; however others may tranſgreſs their duty by not ſhewing him ſuch favour, or by not giving him ſuch aſſiſtance; thoſe pretenſions on his part amount only to a reaſonable expectation, that they

[c] Grot. ibid. § III.

ſhould

ſhould give him ſomething, which is not ſtrictly his own, till they do give him it: and conſequently the neglect or omiſſion on their part cannot in propriety of ſpeaking be called an injury.

Perfect and imperfect rights are ſometimes confounded.

IV. But in many queſtions, concerning what a man has ſuffered, whether it gives him a demand for reparation of damages or not; it will be neceſſary to attend carefully to the matter in diſpute: becauſe he may, in many inſtances, appear to have only been diſappointed, in what he had no more than an imperfect right to, when in fact he has been deprived of what was properly his own, and has ſuffered a real injury.

If we would not be miſled in queſtions of this ſort, we muſt diſtinguiſh between a right to a thing or a ſervice, and a right to aſk for, or to be capable of receiving, ſuch thing or ſuch ſervice. The former may be an imperfect right; the giving us the thing or doing us the ſervice may be matter of favour in the perſons, who have the diſpoſal of them; ſo that no damage would be done us, if, upon our application, we ſhould meet with a refuſal; though it might be ever ſo reaſonable on our part to expect; and though they might not diſcharge their duty, as they ought to do, by not granting us, what we aſk for. But in the mean time the latter right, the right to aſk for ſuch favour, or to be capable of receiving it, may be a perfect one; ſo that whoever unjuſtly hinders us from aſking, or renders us incapable of receiving, does us ſuch a damage, as would entitle us to reparation. If I am ever ſo well qualifyed for any particular office or employment, and my competitor is ever ſo far inferiour to me in the neceſſary qualifications; yet if the perſon, who has the diſpoſal of ſuch office, may give it to whom he pleaſes;

it is in ſome ſort matter of favour, that he ſhould give it to me: and if he was to give it to my competitor, I could only complain of being unkindly uſed, or unfairly rejected; I ſhould have ſuffered no ſuch injury, as would entitle me to reparation. But ſuppoſe, that either by force or by fraud I had been hindered from applying for this favour; they, who hindered me, would have done me an injury properly ſo called: my liberty of applying, or not, was ſtrictly my own; and they, who have unjuſtly taken it from me, or prevented me from uſing it, have done me damage. Indeed in eſtimating this damage, I could not rate it at the full value of the favour, which I might have aſked for, if they had not prevented me: becauſe, if I had aſked for it, I might poſſibly have been refuſed. What I have loſt therefore by their injuſtice is not the favour itſelf, but the chance, which I had for obtaining it: and the damages, which I have ſuſtained, are to be rated according to the value of that chance. It may be matter of favour, that a perſon ſhould leave me a legacy: and however reaſonable it might be in me to expect it, and however unkind or even ungrateful in him to diſappoint my expectations; yet the diſappointment would be no damage. But if unjuſt force or fraud is made uſe of by any one elſe, to prevent him from doing it; he, who thus prevents him, does me an injury: the capacity of receiving this favour was my own; and to take it from me, by unjuſt force or fraud, is properly a damage, and reparation is to be made for it. In ſome inſtances more perſons than one may ſuffer by the ſame act; and though it may in reſpect of ſome of them be only a hardſhip, yet in reſpect of the reſt it may be a real injury. If I have the care of a minors eſtate

eſtate as his guardian, and unkindly or unreaſonably remove the ſteward of that eſtate, who had deſerved well of me in all reſpects, and was particularly well fitted for his employment, in order to put in ſome other perſon; this would be no injury to the ſteward ſo removed, nor would it entitle him to damages: becauſe as the giving him this office at firſt was matter of favour, ſo it is matter of favour likewiſe to continue him in it. But if by this act of mine the ward is a loſer; ſuch loſs is properly an injury to him: and if I did it knowingly, he would have a natural claim to reparation for the damages, that he ſuffers by it.

Some rules to be obſerved in eſtimating damages.

V. [f] In eſtimating the damages, which any one has ſuſtained, where ſuch things, as he has a perfect right to, are unjuſtly taken from him, or witholden, or intercepted; we are to conſider not only the value of the thing itſelf, but the value likewiſe of the fruits or profits, that might have ariſen from it. He, who is the owner of the thing, is likewiſe the owner of ſuch fruits or profits. So that it is as properly a damage to be deprived of them, as it is to be deprived of the thing itſelf. But it is to be conſidered, whether he could have received theſe profits without any labour or expence: becauſe if he could not, then in ſettling the damage, for which reparation is to be made, the profits are not to be rated at the full worth of them; but an allowance is to be made for the labour or expence of collecting or receiving them; and when the labour and expence is deducted from their full worth, the remainder is all, that he has loſt, and conſequently is all, that he has any right to demand.

[f] Grot. ibid. § IV.

Grotius, in eſtimating theſe damages, makes another allowance, which does not appear to have any reaſonable foundation. He thinks, that in making reparation for the profits ariſing from a thing, where the thing itſelf is reſtored, a deduction ought to be made for any improvements, which it has received, whilſt it was witholden from the owner. But certainly in the caſe of diſhoneſt poſſeſſion, whatever improvements the poſſeſſor makes in a thing, whilſt he unjuſtly detains it from the true owner, they muſt be underſtood to be made againſt the conſent of ſuch owner: for it is againſt his conſent, that the other has the thing in his poſſeſſion, and has an opportunity of improving it: and it would be an injury to force him to pay or to allow for what was done againſt his conſent.

[g] In rating the damage, which a man has ſuſtained, we are to eſtimate ſomething more than the preſent advantage, which he has loſt: for the hope or expectation of future advantage is worth ſomething: and if ſuch hope or expectation is cut off by the injury, the value of it is to be allowed him. We muſt however, in eſtimating this hope, be careful not to eſtimate it, as if the advantage had been in actual poſſeſſion: proper deductions are to be made for the accidents, which might have happened to diſappoint his expectations. And in proportion as theſe accidents are greater, or more in number, or more likely to happen, a greater abatement is to be made in conſideration of them. In general, the longer time there is to paſs, before the expected advantage can ariſe, the more room there is for accidents to prevent its being obtained. And for this

[g] Grot. ibid. § V.

reaſon,

reaſon, other circumſtances being equal, the more remote a mans hope is, the leſs it is worth. Thus in general, all other circumſtances being the ſame, a field of corn, when it is deſtroyed in the blade, is worth leſs, than if it had been in the ear.

VI. [h] Beſides the perſon, who immediately does the injury, others may be ſo far concerned in it, as to be under an obligation with him of making good the damages ariſing from it. Acceſſories to an injury obliged to make reparation.

As far as we concur in what another man does, ſo far the act is our own; and the effects of it are chargeable upon us, as well as upon him: if he is conſidered as the principal party, we by our concurrence make ourſelves acceſſories in the injury.

We may make ourſelves acceſſories to what another man does two ways, either by our acts or by our omiſſions: and in either of theſe ways we may be acceſſories in a higher or a lower degree.

They, who have authority over him, that does the injury, and command the doing it; they, who give their conſent, when the injury could not have been done without ſuch conſent; they, who aſſiſt the principal party in doing it; or they, who protect and ſcreen him after it is over, are any of them acceſſories to the injury in a higher degree, and make themſelves ſo by their acts.

They, who were obliged in juſtice to make uſe of their authority in forbidding the injury, and have not forbidden it; they, who were obliged in juſtice to aſſiſt him, who has ſuffered the injury, and have not aſſiſted him; are acceſſories likewiſe in a higher degree, and make themſelves ſo by their omiſſions.

[h] Grot. ibid. § VI. VII. VIII. IX.

Acceſſories in a lower degree are ſuch, as adviſe the injury, or commend and encourage him, who does it. Theſe become acceſſories by their acts.

Such likewiſe are acceſſories in a lower degree, as do not diſſuade the commiſſion of the injury, when they ought to diſſuade it, or do not diſcover it, when they ought to diſcover it. Theſe become acceſſories by their omiſſions.

Any of theſe, as far as they contribute towards the fact, by which the damage is done, are obliged to make reparation for it: becauſe ſo far the fact is their own, and the damage ariſes from them.

Damages how to be demanded from a number of princi-pals.

VII. [i] A number of men may ſo concur in doing damage, as to be all of them principals. In this caſe they are obliged all and each of them to make it good, if the act is ſuch an one, as ariſes from each of them alone, though they happened to be all together, when it was done, and all contributed towards the doing it; that is, if the damage, which they have all done by a joynt act, would have been the ſame, though only one of them had been concerned in it. But if in the whole damage, which is done by them all, only one part aroſe from one of them, and another part from another of them; then each of them is obliged for no more than his own ſhare of the damage: becauſe the reſt of it did not ariſe from him.

We may explane this rule farther by diſtinguiſhing between indiviſible and diviſible acts. Thoſe are called indiviſible acts, in which many perſons may concur; but the whole act would have been the ſame, though only one of them had been concerned in it. Thus if a number of people joyn in ſetting fire to a mans ſtacks

[i] Grot. ibid. § XI.

of

of corn, or in cutting a bank to drown his lands, the whole damage ariſes indeed from their joynt act; but the ſingle act of each of them would have produced the ſame damage. The perſon therefore, who has been injured, has a demand for the whole damage upon each of them: becauſe the whole would have been produced by the ſame act of each: and he has a demand for no more than the whole upon all of them together. So that if all of them can be come at, they are obliged to joyn in making reparation: or if only one of them can be come at, he alone is to make the whole reparation.

Where the act is a diviſible one, that is, where part of the damage is done by one of the perſons concerned, and part by another; ſo that the part, which was done by the one, can be diſtinguiſhed from the part, which was done by the other, and without the concurrence of them all the loſs would not have been the ſame; in this caſe all of them together are obliged to make good the whole damage; but each of them alone, conſidered as a principal, is not obliged to make good more of it, than what aroſe from himſelf. If a man is attacked upon the road, and one perſon wounds him, whilſt another kills his horſe; the whole damage ariſes from both of them together, but not from each of them alone: each therefore, as a principal, is not obliged to make good more of the damage, than what aroſe from his ſhare in the act.

Reparation due for the conſequences of an unlawful act.

VIII. [k] Not only the damages, which a man ſuſtains from an unlawful act, are chargeable upon them, who do the act; but thoſe damages are likewiſe to be made amends for, which are the conſequences of ſuch

[k] Grotius ibid. § XII.

act;

act; though perhaps theſe conſequential damages might not originally have been intended. If it was otherwiſe; if he, who does an unlawful act, was not accountable for all the harm, which ariſes from it either immediately or in conſequence; the whole obligation to reparation might in moſt inſtances be ſet aſide, upon a pretence, that what the author of the damage originally intended was little or no harm to the ſufferer, and that all the reſt aroſe merely from accident. A man ſets fire to a tree or to a ſtack of ſtraw, and in the event a houſe is burnt: if he was not accountable for this conſequence of his act, as well as for the act itſelf, he might eaſily pretend, that he did not deſign to do this harm, even though he did deſign it: and thus, for want of being able to diſprove the truth of this excuſe, the ſufferer might loſe reparation for ſuch loſſes, as the incendiary did really intend. His intention ought therefore to be judged of by what appears: and by this rule of judging, there will be reaſon to conclude, that ſuch conſequences of his act, as might have been foreſeen, and ought to have been guarded againſt, were in his intention, as well as the act itſelf.

We may put this matter in another light. All the harm, that we are obliged to prevent, is juſtly chargeable upon us, if we do not prevent it. We are obliged to prevent all the harm, that ariſes in conſequence from an unlawful action; becauſe we are obliged not to do the action itſelf. Upon this account therefore all the harm, that ariſes from ſuch an action, though by conſequences, which we did not directly intend, is chargeable upon us; and the reparation to be made for ſuch harm is to be made by us, who do the action.

IX.

IX. [1]Grotius has applyed theſe general rules concerning reparation to ſeveral particular inſtances. He, who kills another unlawfully, is obliged to defray ſuch expences, as the perſon killed may have been at in endeavouring to have his wounds cured. He is obliged likewiſe to make amends to thoſe, who had a right to be maintained by the deceaſed; ſuch as his wife, his children, or his parents; according to the value of what they might have expected to receive from him, conſidering his age, his fortune, or his employment. Reparations for unjuſt death.

It may perhaps be queſtioned, whether they had a ſtrict right to ſuch maintenance or other benefits, as they might have received from the deceaſed: and if they had not; it may be aſked, what reſtitution can be due for the loſs of that maintenance or of thoſe other benefits? But to this we anſwer, that however they might have been diſappointed in their expectation, yet the expectation itſelf was their own, and it is a real injury to take it from them. All therefore, which can be proved from this objection, is no more than we allow, that the reparation is to be eſtimated, not according to the worth of their maintenance, or of their other probable benefits, but according to the worth of their expectation.

Grotius here diſtinguiſhes between the murder of a free man and the murder of a ſlave: the life of the former cannot, he ſays, be reckoned in ſettling the damage done by his death; becauſe no perſon has any claim to it, beſides himſelf: but the life of the latter is to be reckoned; becauſe, if the ſlave had been alive, the maſter might have ſold him; and conſequently his

[1] Grotius ibid. § XIII.

life

life itſelf is of value to the maſter. But if we obſerve, that the life of the ſlave can no otherwiſe be looked upon as the maſters property, than as he had an intereſt in it, we ſhall find that there is no occaſion for this diſtinction: ſince as far as the relations of a free man had an intereſt in his life, the perſon, who murdered him, is obliged to make them reparation. So that in either caſe, in ſettling the damage, the life of the deceaſed is eſtimated according to the intereſt, which thoſe, who ſurvive him, might have in it.

Reparation for maiming, wounding, beating, unjuſt impriſonment.

X. [m] He, who has maimed another, does not make him full reparation for the damage ſuſtained; unleſs he pays for the cure, and gives him, beſides ſuch payment, the value of what he has loſt by being rendered incapable to earn ſo much by his labour, as he otherwiſe might have earned, if he had not been maimed. But theſe particulars, which are all that Grotius mentions, do not include the whole of the damage. He ought farther to pay for the loſs of the perſons time, whom he maimed. Our author indeed adds, that if the perſon maimed is a ſlave, amends is to be made to the maſter for any ſcar or blemiſh, which will make the ſlave worth leſs, when ſold; but that in eſtimating the damage done to a free man, no regard is to be had to ſuch blemiſh. Grotius ſhould here have taken another particular into the account, which would have ſet him right in this reſpect, by ſhewing him, that ſatisfaction is to be made to a free man, as well as to the owner of a ſlave, for any ſcar or blemiſh ariſing from their being maimed. The perſon, who is maimed, has a right to freedom from cauſeleſs pain; and he, who has hurt him, has injured him in this right. He may

[m] Grotius ibid. § XIV.

therefore

therefore demand ſmart-money, or ſome conſideration in amends for the pain, which he has unjuſtly ſuffered. Now under this head we may fairly include any blemiſh, which remains, after the firſt ſmart or pain is over: for as far as the injured perſon had a right to be free from ſuch blemiſhes, or from the uneaſineſs, which any deformity will occaſion to him, he has a right to be paid for having them brought upon him. If the perſon, who has been ill treated, ſhould eſcape without loſing his limbs or the uſe of them; yet, if he has been wounded, the expence of cure, the loſs of time, the pain, which he has felt, are all of them damages, for which reparation is due. Or if he has been only beaten, ſo that there has been no expence of cure, and no loſs of time, he has ſtill a demand of ſmart-money, or of ſatisfaction for the pain that he has felt.

What has been ſaid concerning maiming, wounds, or blows will be ſufficient to ſhew what ſort of amends is due to a man, who has been deprived of his liberty by unjuſt impriſonment. His loſs of time is one article in the account, but it is not the only one; the mere uneaſineſs of ſuch a ſituation, under which we may include the diſgrace attending it, is a damage to him.

Reparation for adultery or for debauching a woman.

XI. [n] Grotius in the caſe of adultery takes notice of no other reparation, except that of indemnifying the injured huſband from maintaining the ſpurious offſpring, and that of ſecuring the legitimate children againſt the loſs, which they would ſuſtain, if the others were to ſhare with them in the poſſeſſions of the family. But certainly neither of theſe particulars can be looked upon as reparation for the damages, which the adulterer has done: they are rather cautions againſt

[n] Grotius ibid. § XV.

any

any future damage, which might ariſe in conſequence. The adulterer has deprived the huſband of his wifes affections, has diſturbed the peace and order of his family, and has brought diſgrace and infamy upon it. Theſe are the articles to be eſtimated in determining what reparation is to be made for the damages, that have been done already.

If a woman is debauched, ſays our author, either by force or by fraud; he, who has ſo debauched her, is obliged to make amends for the advantage, which ſhe might otherwiſe have made by ſome future marriage, if he had not hurt her character. He adds, that if the man debauched her under a promiſe of marriage, he is obliged to make his promiſe good. But this obligation, one would think, ariſes rather from the promiſe itſelf, than from the damage done. He could not indeed object her want of chaſtity, as a ſufficient reaſon to releaſe him from his promiſe: becauſe, as her want of chaſtity has been owing to his own act, he cannot make uſe of this pretence to her diſadvantage, unleſs he pays her, not only for having hurt her proſpect of marriage in general, but likewiſe for her loſs in not marrying him in particular.

Reparation for theft.

XII. [o] A theif or robber is obliged to reſtore what he has ſtolen, or an equivalent for it, with all its profits, and a compenſation for the loſs, which followed, or the gain, which ceaſed to the owner, for want of poſſeſſion. In eſtimating the value of the thing and of the profits, Grotius lays it down for a rule, that they are to be rated neither at the higheſt, nor at the loweſt, but at the middle price. However he gives no reaſon, and it will be difficult to find any reaſon, why ſuch a degree

[o] Grot. ibid. § XVI. [p] Grotius ibid. § XXII.

of

of favour ſhould be ſhewn to a man, who has been guilty of theft.

Reparation for ſlander.

XIII. [p] A man may be injured in his perſon not only by death, impriſonment, maiming, wounds, or blows, but by ſcandal or defamation, which deprives him of his reputation and caſts a blemiſh upon his character. Theſe damages are repared by aſking pardon, by a public acknowledgment of his innocence, and by ſuch payments as will make him amends for the loſs, that he has ſuſtained by any falſe aſperſions.

Reparation due, where there is no malice.

XIV. The obligation, to make reparation for damages done by our means, is not confined to thoſe actions only, which are criminal enough to ſubject us to puniſhment. Though there is no degree of malice in an action, by which another is injured, yet it may ariſe from ſome faulty neglect or imprudence in him, who does it, or is the occaſion of its being done: and when any perſon has ſuffered damage, for want of his taking ſuch care, as he ought to have taken; the ſame law, which obliged him, as far as he was able, to avoid doing harm to any man, cannot but oblige him, when he has neglected this duty, to undo, as well as he can, what harm he has been the occaſion of; that is, to make amends for the damage, which another has ſuſtained through his neglect.

Thoſe faults, which conſiſt in neglect, are ſometimes divided into three degrees; a great fault, which is ſuch a neglect, as all men may well be ſuppoſed, and ought to guard againſt; a ſmall fault, which is ſuch a neglect, as diſcrete and diligent men are not uſually guilty of; and the ſmalleſt fault, which is ſuch a neglect, as the moſt exact and moſt prudent take care to avoid.

Indeed

Indeed in many inſtances of groſs faults, it is ſo difficult to diſtinguiſh between a mere neglect and a malicious deſign, that, beſides the demand of reparation for damages done, ſome puniſhment may reaſonably be inflicted upon the perſon ſo offending.

Sometimes, and eſpecially in what may ſeem faults of the lower degrees, the damage, which ariſes from our ſuppoſed neglect, will be found upon enquiry to have been rather owing to the neglect of the perſon, who ſuffers it; and then we are not only clear from all guilt, that may ſubject us to puniſhment, but from all blame, that might oblige us to make reparation.

A man profeſſes ſome art or calling, in which he is not completely ſkilful, and through his want of ſkill, they, that employ him ſuffer damage; or, ſuppoſing him to underſtand his buſineſs, they, that employ him, may ſuffer the like damage, through ſome groſs neglect of his: in either caſe he is obliged to make reparation. This is the caſe, when a phyſician deſtroys his patient by adminiſtering improper medicines through ignorance, or ſuffers him to periſh by neglect and deſertion. Such faults as theſe are of the groſſer ſort, and approach ſo near to ill deſign, as not eaſily to be diſtinguiſhed from it. [q] If others ſuffer by us, whilſt we are engaged in any ſport or diverſion, as if a man was to be killed or maimed by our diſcharging a gun; notwithſtanding we had no deſign of doing hurt to any one, and can make this appear, yet we are bound to make reparation: becauſe we ought to have been ſo careful, in following our own amuſement, as to prevent any damage, that might happen to others, from what is

[q] Puffendorff. B. III. C. I. § VII

merely

merely matter of pleaſure to us. If a ſoldier is exerciſing himſelf in an improper place, and does any hurt with his arms, it is his fault, and he muſt repare the damage. It would have been otherwiſe, if he had been in the place appointed for this purpoſe; becauſe then what hurt was done by him would have been owing to their fault, who knowingly or negligently came in his way. A feller of wood kills a man, who is paſſing upon a road or near a town, with the limb of a tree, which he is cutting down, without giving notice, that it was falling: this is his neglect, and reparation is due from him. But if he did give notice, and the perſon, upon whom the limb of the tree fell, neglected to get out of the way, he is not chargeable with the damage done. Nor could he have been chargeable with it, even though he had given no notice, if he had been felling wood at a diſtance from the road or in the middle of the field: becauſe the other perſon would have been in fault for having been there. The damage, which a mans ſervants do, is in many inſtances chargeable upon himſelf: becauſe he ought to take care, that they ſhould behave better. If a traveller loſes goods in an inn, where he lodges; the maſter of the houſe ought to repair the loſs: becauſe a diſcrete and diligent man would take care to provide himſelf with honeſt ſervants, and would prevent whatever was under his charge from being ſtolen. If the traveller had locked up his goods in his own apartment; there would not be the ſame reaſon for charging the loſs of them upon the maſter of the houſe: becauſe the traveller has then taken the care and ſecurity of them upon himſelf; and if they are loſt, it is but reaſonable to conſider them as loſt through his own neglect: eſpecially as there

would otherwiſe be room for colluſion between him and others, who might take them away with his privacy. When any thing, which is thrown out from a window, does any damage to perſons paſſing by in the ſtreet; the maſter of the houſe, from whence it is thrown, is chargeable with it: he is certainly in fault, if he threw it out himſelf: and he is in ſome fault, though ſome one elſe threw it out: becauſe he ought to take better care of the behaviour of his family. The damage, which a mans beaſts do, may reaſonably be looked upon as done by himſelf: becauſe it is his buſineſs to take care, that they ſhall be kept in good order. Indeed if they were put into their proper place, and have gotten into the grounds of another man, becauſe this other does not keep up his fences; the damage is done through the neglect of the owner of the grounds, and not through the neglect of the owner of the cattle. In like manner if a man was paſſing through grounds, where there was no common path or way, and where he had no buſineſs, and ſhould be wounded or maimed by a horſe or an ox, which were in the paſture of their owner; the fault is in the perſon ſo hurt; becauſe he ought not to have been there.

CHAP.

CHAP. XVIII.

Of puniſhment.

I. *Puniſhment what.* II. *Juſtice of puniſhment depends upon the ends of it.* III. *What thoſe ends are.* IV. *The juſtice of puniſhment explaned.* V. *Extraordinary tortures in capital puniſhments unjuſt.* VI. *Obligations ariſing from a crime what.* VII. *The juſtice of puniſhment is negative.* VIII. *Who may puniſh in a ſtate of natural liberty.* IX. *What crimes puniſhable by man in the liberty of nature.* X. *What guilt is.* XI. *How guilt is eſtimated.* XII. *Meaſure of puniſhment how adjuſted.* XIII. *Mercy or clemency how exerciſed.* XIV. *How the goods of a criminal are affected by puniſhment.* XV. *Acceſſories to a crime puniſhable.* XVI. *Thoſe, who have no ſhare in a crime, not puniſhable.* XVII. *Obligation to puniſhment does not deſcend from the anceſtor to the heir.*

Puniſhment, what.

I. A [r] Crime, as it does damage, obliges the criminal to make reparation; and as it ſhews a diſpoſition to do harm, it makes him liable to be puniſhed.

By puniſhment we underſtand ſome evil of ſuffering, which is inflicted upon account of ſome evil of doing. It is ſome pain or uneaſineſs, ſome loſs or harm, which he, who has deſignedly occaſioned any pain or uneaſineſs, any loſs or harm to others, is made to undergo.

Juſtice of puniſhment depends upon the ends of it.

II. [s] Grotius lays it down as a ſelf-evident principle, that he, who has done evil, may juſtly be made to ſuffer evil. If this principle was as clear and indiſputable, as our author ſuppoſes it to be; one of the greateſt

[r] Grot. L. II. C. XX § I. [s] ibid.

difficulties relating to puniſhment would be removed. It would be ridiculous to enquire, why it is juſt to puniſh a criminal; if the juſtice of making a man ſuffer harm, who had done harm, was ſelf-evident.

[t] He does not ſeem however to be quite ſatisfyed in his own mind, that this principle will entirely juſtify us in puniſhing criminals. The moſt, that he thinks can be proved from it, is, that no injury is done to a criminal by puniſhing him: but yet, he ſays, it does not follow from hence, that criminals are to be puniſhed.

It is not very eaſy here to underſtand his meaning. If by ſaying it does not follow from this principle, that criminals are to be puniſhed, he means, it does not follow, that we are obliged in duty to inflict puniſhment upon criminals; this is very certain. But his enquiries concerning puniſhment might, notwithſtanding this difficulty, have ſtopped at this firſt principle, if the principle had been ſelf-evidently true: it may not perhaps be ſufficient to prove, that inflicting puniſhment is a duty: but let him carry his enquiries as far as he will into the ends of puniſhment, he will ſtill find the ſame defect, if it is a defect, in all other principles. Neither the ſuppoſed ſelf-evidence of its being lawful to make them ſuffer evil, who have done evil, nor any of the ends propoſed in puniſhing will prove that we are naturally obliged in duty to puniſh a criminal. But if, when he ſays, it is no conſequence of his principle, that criminals are to be puniſhed, he means, that notwithſtanding there is no injury in making thoſe ſuffer evil, who have done evil, it is no conſequence, that they may be puniſhed, conſiſtently with the law

[t] Grot. ibid. § IV.

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of nature; he plainly contradicts himself: if there is no injury in punishing criminals, it must undoubtedly be consistent with the law of nature to punish them.

To reconcile him with himself, we must suppose him to mean, that though the punishment of a criminal is self-evidently consistent with the law of justice, yet we ought to enquire farther, whether the law of benevolence or humanity does not forbid it: because as some pain or loss is contained in the notion of punishment; such pain or loss would be a sufficient reason against inflicting it; if no advantage arose from it, or no beneficial purposes were answered by it.

But then these beneficial purposes are as necessary to be taken into the account in order to reconcile the notion of a right to inflict punishment with the duties of justice, as to reconcile the actual inflicting of it with the duties of humanity. All causeless harm or loss, that we bring upon another, is unjust: and if punishment is not intended in its own nature to obtain some useful end; I see not how we shall be able to shew, that the loss or harm implyed in it is not causeless harm. Upon the whole then, it seems necessary for us, in vindicating the justice of punishment, to consider the ends, which are proposed by it: since the principle, which Grotius lays down as a self-evident one, cannot be shewn to be true, without having recourse to the purposes, which punishment is designed to answer.

The ends of punishment what they are.

III. [u] Our author takes notice of three ends, which are designed to be brought about by inflicting punishment; first, the benefit of the criminal himself; secondly, the benefit of the person, who has suffered by

[u] Grot. ibid. § VI.

the crime; and thirdly the benefit of mankind in general.

The two laſt of theſe may well be included in the ſingle end of preventing the criminal from offending again: for by this means the benefit either of the injured perſon, or of the reſt of mankind, is produced as effectually, as the puniſhment of the criminal can produce it, if we look no farther than the criminal himſelf.

Puniſhment has indeed ſometimes a farther view, and is deſigned not only to prevent or diſcourage the criminal, who undergoes it, from offending again, but to deter others likewiſe from following his example, for fear of meeting with the ſame treatment, that he has met with. But this is only a ſecondary end of puniſhment; it may, where a criminal has deſerved to ſuffer, make it prudent not to pardon him, and may engage us likewiſe to puniſh him in a public manner. But if our right to puniſh had nothing elſe to ſupport it, we ſhould never be able to reconcile it either with juſtice or with humanity. For certainly to bring any harm or loſs upon one man, that we may not ſuffer the like from others, is, in reſpect of him upon whom it is brought, no better than a cauſeleſs harm or loſs.

The firſt end of puniſhment, which Grotius mentions, is likewiſe but a ſecondary one. If there is no other reaſon for inflicting puniſhment beſides the amendment of the criminal; this alone is not ſufficient to juſtify it, when men live out of civil ſociety. In the liberty and equality of nature every mans intereſts are in his own hands; he may purſue his own good, or he may neglect it, at his own diſcretion. Others may adviſe him what courſe to take, as moſt for his benefit;

fit; but if he ſhould chuſe to neglect his own benefit, they have no right to force him to purſue it; unleſs by his neglecting it they ſuffer ſome injury. Thus far indeed in the equality of nature the amendment of the criminal comes within the view of them, who puniſh him: they have a right, as we ſhall ſhew preſently, when he has done them any injury, to hinder him from doing ſo again: and as his amendment will anſwer this purpoſe, they may endeavour to correct his bad diſpoſition, or may compel him to follow his own intereſt, in order to reſtrain him from breaking in upon theirs.

From what has been ſaid it will appear, that the primary end of puniſhment is to prevent the criminal from offending again. And that the two ſecondary ends of it are to amend the criminal, and to deter others from following his example.

The juſtice of puniſhment explained.

IV. Whilſt a man takes care to live innocently, whilſt he obſerves his duty, ſo as not to hurt any one; we have no pretence to demand any ſecurity of him, that he will not hurt us. The law of nature is our ſecurity: he ſhews by his behaviour, that he is ſenſible of his obligation to obſerve this law, and that it has authority enough with him, to prevent him from doing wrong. But when he has once done wrong, when he has tranſgreſſed this law, and has ſhewn by doing ſo, either that it has no authority at all with him, or not ſufficient authority to ſecure us againſt ſuffering by his means; it then becomes lawful for us to puniſh him; that is, it then becomes juſt upon account of the evil which he has done, to inflict ſuch evil upon him, as will prevent him from doing the like again. We cannot ſuppoſe the law of nature to forbid our

taking ſuch meaſures with a man, as his conduct has made neceſſary for us to take, in order to obtain the end, which the law itſelf has in view. The law of nature intends to ſecure us againſt injuries. When therefore a man has ſhewn us by his conduct, that he is diſpoſed to injure us; this law leaves us at liberty to uſe ſuch means as are neceſſary to prevent him.

The ways, by which we may prevent him from doing harm again, are by taking from him either the will to do it, or the opportunities of doing it, or the power of doing it. If we make him undergo ſome corporal pain, ſubmit to ſome diſgrace, or ſuffer ſome loſs; this may diſcourage him from offending again, or may take from him the will to do harm. If we ſhut him up in priſon, or employ him in conſtant labour, or force him to live at a diſtance from us, which in a ſtate of civil ſociety would be baniſhment, he will have few or no opportunities of hurting us. Death, which is called capital puniſhment, effectually puts it out of his power to offend.

The reader, I imagine, does by this time ſee clearly, what ſort of a right over the criminal our right of puniſhing is, and for what reaſon ſome previous crime is requiſite to give us ſuch a right. Our right of puniſhing is nothing more than a liberty of uſing ſuch means, as are neceſſary to ſecure us againſt ſuffering any farther harm from a perſon, who by having done harm already has ſhewn himſelf diſpoſed to do it, if we do not take care to prevent him. But till he has ſhewn himſelf to be thus diſpoſed by what he has done already, that is, till he has committed a crime, we have no ſuch right over him. All force, that we make uſe of againſt him, all harm that

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we deſignedly do him, upon pretence of compelling him to obſerve his duty, when he always has obſerved it, or of preventing him from tranſgreſſing his duty, when he never has tranſgreſſed it, is unjuſt force and cauſeleſs harm.

Upon the whole, as on the one hand no puniſhment can be juſt, where there is no crime; ſo on the other hand, it would be impoſſible to ſhew, even after a crime has been committed, that we have a right to puniſh, or that puniſhment is juſt, unleſs we ſhew it from conſidering the end, for which it is inflicted.

Extraordinary tortures in capital puniſhments unjuſtifiable.

V. If the right of puniſhment is, what I have repreſented it above; if it is a liberty of uſing ſuch means as are neceſſary to ſecure us againſt ſuffering any farther harm from a perſon, who by having done harm already has ſhewn himſelf diſpoſed to do it, unleſs we take care to prevent him; it will be no eaſy matter, where we puniſh capitally, to juſtify any extraordinary tortures in the manner of taking away the criminals life; ſuch as impaling, crucifixion, or breaking on the wheel.

The corporal pain, which a criminal is made to undergo, is not unjuſt; where his life is ſpared: becauſe ſuch pain may correct his bad inclination, and, by taking from him the will to do harm, may ſerve to ſecure us againſt his doing any for the future. But certainly, when we take away his life, any pain that we give him, which might have been avoided, is ſo much cauſeleſs harm done to him. There is no occaſion for this ſort of diſcipline to be uſed in order to correct his evil diſpoſition, when by putting him to death we take away from him the power of hurting us. The only uſe, that can be pretended in defence of ſuch cruelties, is, that they will be a terror to others, who ſeeing what they

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are to ſuffer, if they do as he has done, will be more likely to be kept from doing ſo. And it muſt be owned, that this purpoſe, where we find it neceſſary to be purſued, will be ſufficient to juſtify us in carrying our right of puniſhing to the utmoſt extent; in not pardoning, where we ſhould otherwiſe have been diſpoſed to pardon; in allowing the criminal as little time, as may be, to fortify himſelf againſt the apprehenſion of death; in making his puniſhment as public, as poſſible; in expoſing his body or mangling it, after it is dead or inſenſible, and is by that means incapable of ſuffering any real harm.

But however we may deſign to terrify others; a right to uſe ſuch means, as the criminals behaviour has made neceſſary for us to uſe, in order to ſecure ourſelves againſt any future harm, which he may do us, cannot poſſibly be conſtrued to be a right to uſe him in ſuch a manner, as we may think neceſſary, in order to ſecure ourſelves againſt any future harm, which other men may do us. Nor do I ſee upon what other principle ſuch a practice can be juſtifyed; unleſs it could be ſhewn, that a right to puniſh is a right to treat a criminal in what manner we pleaſe.

Obligation ariſing from a crime what.

VI. We have ſeen what right ariſes over a mans perſon upon account of his having committed a crime: and it is plane from the nature of the right on one part, what obligation it lays upon him on the other part. A right in others to uſe ſuch means as are likely to hinder him from doing harm again, that is, a right in them to puniſh him, implys an obligation on him to ſubmit to puniſhment: for if he had any right or was naturally at liberty to reſiſt puniſhment, they could not naturally have any right to inflict it.

VII.

VII. [w] When juſtice is divided, as Grotius divides it, into expletive and attributive; it may be a queſtion to which of theſe two ſorts puniſhment belongs. If the whole notion of juſtice is included in this diviſion of it, our common ways of ſpeaking ſeem to imply, that puniſhment belongs to one of theſe two ſorts, or that either expletive or attributive juſtice is exerciſed, when we inflict puniſhment. There is certainly the appearance of exerciſing ſome ſort of juſtice, when we ſay, that puniſhment is juſtly due to a crime, and that we have done juſtice by inflicting it.

The juſtice of puniſhment is negative.

Now expletive juſtice, or juſtice properly ſo called, conſiſts in ſatisfying a mans ſtrict demands, or in taking care, that he ſhall have what is ſtrictly due to him. And attributive juſtice, which differs little or nothing from benevolence, conſiſts in giving him all, that he has fair and reaſonable grounds to expect from us, though he cannot properly demand it.

Puniſhment can ſcarce be thought to belong to this latter ſort of juſtice; not only becauſe there is no appearance of any benevolent affection in puniſhment; but likewiſe becauſe puniſhment, inſtead of giving the criminal what he could not claim, takes from him ſomething, which he otherwiſe might have claimed; it takes from him his life, or his liberty, or the uſe of his limbs, or his natural freedom from pain.

One would rather be inclined to think, at firſt ſight, that it belongs to expletive juſtice; the common ways of ſpeaking about it already mentioned would lead us to think ſo. And yet we ſhall find upon enquiry, that theſe are rather improper ways of ſpeaking: becauſe

[w] Grot. ibid. § II.

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the criminal has no claim to puniſhment, or ſuch a claim as we may be ſure he very willingly gives up; ſo as to make it no injuſtice to him, no witholding of any thing, which he demands, if we were not to puniſh him. If expletive juſtice is done to any one in puniſhing, it is to them, who inflict the puniſhment, and not to him, who undergoes it: their right and not his is ſatisfyed by what he ſuffers.

The fact is, that juſtice, in the original notion of it, is a negative duty; it conſiſts in doing no cauſeleſs harm, and implys rather the not doing what is wrong, than the actual doing what is right. But out of this negative duty, a poſitive one ariſes: the ſame law, which forbids us to do any cauſeleſs harm, muſt be underſtood to command us, where any one has ſuffered ſuch harm by our means, to make him reparation. Now though expletive juſtice in its full extent comprehends both the negative and the poſitive duties of juſtice; yet it is more commonly uſed to ſignify the duties of the latter ſort, thoſe duties of juſtice, in which we are active. And in this ſenſe we may venture to ſay, that expletive juſtice is not exerciſed in puniſhing; the act of puniſhing does not ſatisfy any demand, which the criminal had upon us. The juſtice of puniſhment is rather of the negative ſort; it is called juſt only becauſe it is not unjuſt; it is rather the not doing what is wrong, than the doing what is right. But as the inflicting puniſhment implys ſome action, and is not merely a forbearance to act; we are apt to conſider the juſtice of it, as of the poſitive, and not as of the negative ſort; to call it doing juſtice upon the criminal or giving him what is his due, though in fact it is no more than not doing him injuſtice, or not taking from

from him any thing, which his crime has left him a claim to, if we have a mind to take it from him.

Who may puniſh in a ſtate of natural liberty.

VIII. If it was at all neceſſary, that he, who puniſhes a criminal, ſhould be ſuperiour to the criminal, it muſt in a ſtate of natural liberty have been unlawful for any one to puniſh another; or though there is no injuſtice in the notion of inflicting puniſhment, conſidered in itſelf, yet in the equality of nature, no perſon for want of the neceſſary ſuperiority could juſtly have inflicted it: however lawful the action of puniſhing might be, when conſidered abſtractedly from the agent; yet the inſtitution of civil authority would be neceſſary to make it lawful for any perſon to do that action. But from what has been proved already, it will appear, that no ſuch ſuperiority of the perſon, who inflicts puniſhment, over him, who ſuffers it, can be naturally required to make the action of puniſhing lawful in reſpect of the agent. Mankind in general, and he in particular, who has ſuffered by a crime, have an intereſt in reſtraining ſuch injuſtice, as they are all likely to ſuffer by at another time, if it is not reſtrained. It is for the common good, that whoever will not liſten to the dictates of reaſon, and obey the law of nature, in conſideration of its ordinary ſanctions, ſhould be compelled to do his duty, or be prevented from tranſgreſſing it, either by being made to feel ſuch pain and inconvenience, in conſequence of the miſchief which he has done, as will incline him to behave better, or by being deprived of the opportunities or of the power to do otherwiſe. From this beneficial end of puniſhment we have ſhewn, that the law of nature allows of puniſhment, or leaves all mankind at liberty to inflict it: and it is impoſſible, that all mankind ſhould be

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at liberty to inflict puniſhment, and yet that it ſhould at the ſame time be unlawful for any of them to inflict it.

[x] Some inconveniences might probably ariſe in the exerciſe of this univerſal right to puniſh, when the puniſhment is inflicted by the perſon, who is the immediate ſufferer by what the criminal has done. His paſſions may be ſo much enflamed by what he has felt, as to miſlead him in judging of the fact, and in proportioning the puniſhment to the guilt of it: or if he ſhould be more calm, and not be tranſported by the more violent paſſions; yet he would be liable to be byaſſed in his judgment by ſome ſelfiſh regards; few men being ſo little prejudiced in their own favour, as to be fair judges in their own cauſe.

Nor would the exerciſe of this right be without its inconveniences, if it was left promiſcuouſly to others, who are not ſo immediately affected by the crime. A promiſcuous right to puniſh is not likely to be duly exerciſed; even ſetting aſide the conſideration of paſſion and ſelfiſhneſs. It requires more diligence to ſearch into the fact, more prudence to weigh all its circumſtances, and more equity to proportion the puniſhment to it, than moſt men are maſters of. Beſides; as it would be unjuſt to puniſh a man twice or oftener for the ſame offence, that is, to reſtrain him by force from offending again, when he has been reſtrained already; ſo amongſt a multitude of puniſhers it would be unlikely, that he ſhould eſcape with being puniſhed only once: becauſe it is unlikely, that where all have an equal right, the reſt ſhould acquieſce in what any one of them has done; or that they ſhould all pay ſuch a de-

[x] Grotius ibid. § VIII. IX.

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ference to the diligence and prudence and equity of any one, as not to diſpute his pretenſions to inflict the puniſhment in preference to themſelves.

But the inconveniences, which may attend the exerciſe of a right, are no evidence, that ſuch a right does not ſubſiſt: men may have a right of acting, notwithſtanding it is poſſible for them frequently to abuſe this right. If it was otherwiſe, we muſt be beholden to civil inſtitutions, not only for the right of puniſhing, but for the rights of defence and of demanding reparation: ſince either of theſe two rights are as likely to be abuſed, as the right of puniſhing, where men are judges in their own cauſe. All that will follow from its being more probable that the right of puniſhing ſhould be abuſed in the liberty of nature, than in a ſtate of civil ſociety, is no more than what might be proved by many other arguments, that the inſtitution of magiſtrates with civil power is for the general benefit of mankind.

What crimes are puniſhable by men in the equality of nature.

IX. We ſhall find in our future enquiries, that many actions become ſo criminal in a ſtate of civil ſociety as to be puniſhable, which in the equality of nature men have no right to puniſh. At preſent we ſhall conſider only what crimes are puniſhable by man, in a ſtate of nature, before any civil connections were made, or any poſitive laws were inſtituted.

[y] If the foundation of our right to puniſh has been truly laid, it will be obvious, that no crimes are puniſhable by mankind, but ſuch as do harm, that is, none but ſuch as contain in them ſome notion of injuſtice towards mankind. From whence it follows, that the only actions, which we have a right to puniſh in the

[y] Grotius ibid. § XVIII, XIX, XX.

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liberty of nature, are thoſe, which are naturally unjuſt.

If a man is void of benevolence, or wholly diſinclined to do us good; this is a breach of his duty indeed; but it is ſuch a breach, as muſt be left to the great author of the law of nature to puniſh, who will undoubtedly take effectual care to vindicate the authority of his own laws: for what right can we have to make a man ſuffer for not doing what we had no right to demand of him; however reaſonable it might be for us to expect it from him?

The law of nature commands men to be chaſte and temperate; and he, who eſtabliſhed that law, will puniſh the breach of it. But if a mans lewdneſs or intemperance were to hurt no one but himſelf, it does not appear, that any man has a right to reſtrain him by force from following ſuch evil courſes.

The exiſtence of a God is written throughout every part of nature in ſuch legible characters; and the duty of honouring him is ſo plane to every capacity; that they, who diſbelieve his exiſtence, or deny him that honour, which is due to him, cannot but be underſtood to offend againſt the cleareſt precepts of the law of nature: they muſt be wilfully blind, if they do not ſee their duty, and perverſely criminal, if they do not practiſe it. But till we have a right to demand, that men ſhould believe this obvious truth, and practiſe this plane duty; that is, till we are ſome way or other hurt, or ſome real injuſtice is done us, by the contrary; it does not appear, that we have a right to puniſh thoſe, who diſbelieve the one, or refuſe to practiſe the other. Civil connections, when we are united into ſocieties, may give us this right, as ſhall be ſhewn in its proper place, they may make either atheiſm or irreligion

irreligion puniſhable by us; but it will be difficult to make out, that we have any ſuch right in the liberty of nature.

Indeed whenever a mans want of benevolence changes, as it commonly does, into a want of juſtice; whenever his lewdneſs is attended, as it almoſt always is, with ſome harm to mankind; whenever his intemperance leads him to injure them; and whenever his irreligion is attended with its uſual conſequence of making him hurtful to them; as even in the liberty of nature they have a right to demand a contrary behaviour of him, they have a right likewiſe to uſe ſuch means, as are neceſſary to make his behaviour what it ought to be, or to prevent it from being otherwiſe.

Grotius maintains, that one man is not puniſhable by another for any criminal intentions of any ſort, not even when theſe intentions come to be known by ſome ſubſequent confeſſion. And certainly the reaſon of the thing is on his ſide. The mere intentions of a man, whilſt he keeps them to himſelf, cannot be puniſhable; becauſe they are not known. And a ſubſequent confeſſion of ſuch intentions implys, that they are laid aſide, before they are made public: in which caſe there can be no right of puniſhing; becauſe there can be no right to reſtrain a man from doing an injury, where we have ſufficient evidence, that he has already reſtrained himſelf.

We may add, that if by any means we come to the knowledge of his intentions; whilſt they ſubſiſt, but have not yet been put into execution; we have no right to puniſh him for them: becauſe the proper notion of puniſhment is an evil inflicted upon account of ſome crime, which has been actually committed: and whilſt

the crime remains in the intention, it is not actually committed, it is only beginning. However, in theſe circumſtances, though we have no right of puniſhing, we have a right of defence, which is a right of doing much the ſame thing under a different name.

Our author mentions another ſort of crimes, which he ſays are not puniſhable by man, and calls them ſuch crimes, as human nature cannot avoid. It is not eaſy to imagine what crimes he had in his mind, when he gave them this general character. No action can be criminal, if it is not poſſible for a man to do otherwiſe. An unavoidable crime is a contradiction: whatever is unavoidable is no crime; and whatever is a crime is not unavoidable. If indeed he only meant, that where a criminal act is propoſed to a man, though he may have a natural power of avoiding it, yet if he is threatened, in caſe he will not do it, with ſuch an evil as human nature cannot well bear up againſt, this circumſtance will greatly abate, if not wholly remove the guilt of his compliance; this opinion can ſcarce be contradicted. But then an enquiry of this ſort would have been made more properly, where he is treating of the manner, in which the guilt of a crime is to be eſtimated, than where he is enumerating the ſeveral ſorts of crimes, which are not puniſhable by man.

What guilt is.

X. Guilt is ſometimes defined to be the obligation, which a man is under, to ſubmit to puniſhment, in conſequence of any crime, that he has committed. But this, one would think, cannot be a true definition of it; at leaſt it does not ſuit at all with our common ways of ſpeaking about guilt. We commonly ſpeak of guilt, as if it was capable of being greater or leſs: whereas the obligation to puniſhment does not admit of degrees;

grees; there is no medium between being obliged and not obliged. And certainly, if this is all that we mean by guilt, many propoſitions relating to puniſhment, which we frequently hear, and which ſeem to have ſome ſenſe in them, muſt be very trifling and uninſtructive. When a man is ſaid to deſerve puniſhment upon account of his guilt; the meaning would be, if this was the true notion of guilt, that he deſerves puniſhment, becauſe he is obliged to ſubmit to it. And it would be ſtill more uninſtructive to ſay, as we ſometimes do, that a man is obliged to ſubmit to puniſhment upon account of his guilt: for this would amount to no more, than if we had ſaid, that he is therefore obliged to ſubmit to puniſhment, becauſe he is obliged to ſubmit to it.

Let us try, whether we cannot find out ſome other definition of guilt, which will explane the notion of it with more exactneſs. Now it ſeems to be an agreed point, that guilt is that quality in a criminal, which deſerves puniſhment, or which gives mankind a right to puniſh him. By attending therefore to the foundation of our natural right to puniſh, we may perhaps be able to find out, what that quality in the criminal is, which makes him deſerve it. Mankind have a right to puniſh any perſon, or he deſerves puniſhment at their hands; when his actions have ſhewn them, that he has a diſpoſition to injure them, or to do them harm, unleſs they take care by forcible means to prevent him from doing it. This diſpoſition therefore is what makes the criminal deſerve puniſhment: and conſequently, as far as men are concerned in puniſhing, we may define guilt to be a diſpoſition to do harm, which has ſhewn itſelf by ſome actual harm already done.

How guilt is eſtimated.

XI. [z] The guilt of a man is greater or leſs in proportion as his diſpoſition to do harm, appearing from ſome harm already done, is ſtronger or weaker. Now there are two ways of judging how ſtrong or how weak this diſpoſition is; firſt from conſidering the nature of the crime itſelf, and ſecondly from conſidering the circumſtances of the criminal.

Guilt, according to the notion of it juſt now explained, is undoubtedly a perſonal quality; becauſe the diſpoſition to offend is in the criminal, and not in the crime. However for the ſake of ſpeaking more diſtinctly upon this ſubject, I ſhall take the liberty, when we eſtimate the guilt of a perſon from conſidering the crime itſelf, which he has committed, to call it the guilt of the crime; and when we eſtimate it from conſidering the circumſtances of the perſon, who commits a crime, I ſhall call it the guilt of the criminal.

In general the guilt of a crime is eſtimated by the evil or harm, which it does; not becauſe guilt properly conſiſts in ſuch harm; but becauſe any perſons diſpoſition to do harm is ſtronger or weaker in proportion to the greatneſs or the ſmallneſs of the harm, which he can bring himſelf to do. The harm, which others ſuffer by the crime of any perſon, is the immediate reaſon, why he ſhould not have committed it: ſo that he, who does more or greater harm, breaks through ſtronger reaſons forbidding what he does, than he, who does leſs harm: and the ſtronger reaſons there are againſt offending, the ſtronger diſpoſition to offend there muſt be in him, who can get over them. In ſhort, there is ſo little difference between a diſpoſition to do great harm, and a great diſpoſition to do harm, that one of them may very

[z] Grot. ibid. § XXVIII, XXIX, &c.

well

well be looked upon as the meaſure of the other. Since therefore the guilt of a crime conſiſts in the diſpoſition to do harm, which the criminal ſhews by committing it; and ſince this diſpoſition is greater or leſs in proportion to the harm, which is done by the crime; the conſequence is, that the guilt of a crime follows the ſame proportion; it is greater or leſs, according as the crime, in its own nature, does greater or leſs harm. Thus as murder deprives a man not only of all his preſent happineſs, but of the poſſibility likewiſe of obtaining any future happineſs in this world; it does him the greateſt poſſible harm, and is therefore conſidered as a crime of the greateſt guilt. The divine author of the moſaic law places adultery in the next degree of guilt to murder; as it does a man the greateſt harm, that he can ſuffer, next to that of loſing his life, by robbing him of all his domeſtic joy and comfort. Theft, which takes from a man ſome of the means of happineſs by taking from him his goods, implys much harm in it towards him, who ſuffers ſuch a loſs, and conſequently a diſpoſition to do much harm, in them, who are the authors of it: the guilt therefore of this crime being eſtimated by the rule here laid down, though it does not riſe ſo high as that of murder, is little inferiour to that of adultery. Falſe aſperſions, by which a man is injured in his character or credit, may and frequently do produce conſiderable harm to him; they are therefore crimes of ſome guilt: but becauſe the harm is leſs certain, the guilt of ſuch crimes is leſs, than that of the crimes before mentioned.

There are ſome circumſtances attending the criminal act itſelf, which will aggravate the guilt of it; ſuch as impiety towards a parent, inhumanity towards a friend,

or ingratitude towards a benefactor. The want of piety, or of humanity, or of gratitude does not indeed ſeem to be puniſhable in itſelf; where men live in the liberty of nature: but if murder, or adultery, or theft, or ſlander, are attended with ſuch circumſtances; the guilt of theſe crimes is reaſonably eſteemed to be much greater, than it would have been otherwiſe: becauſe where the ſame harm is done, a mans hurtful diſpoſition muſt be greater, if he not only breaks through the obligations of juſtice, but ſuch obligations likewiſe, as would, if he had liſtened to them, have engaged him to hold directly the oppoſite conduct, to advance the good and welfare of thoſe, to whom he has done evil.

Thus far we have ſeen how the guilt of a crime is to be eſtimated: in which eſtimation we conſider only the act itſelf and the circumſtances of it. But when an act is done by ſome particular perſon, in order to determine his degree of guilt, regard muſt be had to the ſituation and circumſtances of the agent, as well as to the nature and circumſtances of the act. What is cheifly to be conſidered in reſpect of the agent relates either to his knowledge, or to his freedom. As his underſtanding is more clearly informed, and enables him to ſee his duty more planely; or as his will is leſs forcibly reſtrained, and enables him to perform his duty more readily; his guilt in tranſgreſſing that duty is ſo much the greater. He muſt have the ſtrongeſt diſpoſition to offend, who offends againſt the cleareſt evidence, and with the feweſt reſtraints upon his freedom of choice. On the contrary, as entire and invincible ignorance of what ought not to be done, or an abſolute impoſſibility of doing otherwiſe, would clear a man of all guilt;

ſo

ſo in proportion as he is nearer to ſuch a ſtate as this, his guilt will be leſs. That where the ſame crime is committed by different perſons, their guilt ſhould be conſidered as greater or leſs, in proportion as their knowledge and freedom were greater or leſs, ſeems to be agreeable to the common notions of mankind. When a perſon is driven by ſome great provocation to commit a crime, or when he is tempted to commit it in order to avoid ſome great evil, which he could not otherwiſe have eaſily avoided; theſe are generally looked upon as circumſtances in his favour, which leſſen his guilt. But if a reaſon was to be aſked, why theſe circumſtances ſhould have ſuch an effect; no reaſon can be given for it, but what is taken from the principle here advanced: the provocation, which he received, or the temptation, which he was under, have, either by clouding his underſtanding, prevented him from ſeeing his duty, or by putting a force upon his will, prevented him from performing it. And in proportion as his view of what he is obliged to is leſs diſtinct, or his liberty of doing it is more reſtrained, his acts, however criminal they may be in themſelves, have ſo much the leſs guilt in them, when conſidered as done by him in theſe circumſtances: becauſe they do not ariſe ſo much from any diſpoſition in him to do harm, as from his ignorance, or his reſtraint, from his want of underſtanding, or his want of freedom.

But then it is to be remembered, that if ignorance or reſtraint are admitted in alleviation of a mans guilt, as rendering his act in ſome ſort the reſult of neceſſity, rather than of his own diſpoſition to offend, this ignorance or reſtraint muſt be ſuch, as have not originally been owing to himſelf. An involuntary act, if the ne-

ceſſity, which drives us to it, was brought upon us at firſt by our own free choice, muſt in all reaſon be conſidered as a voluntary act. Thus, though madneſs might clear a man from any guilt in what he does, yet drunkenneſs, notwithſtanding he, who is drunk, may be really mad for the time, would be no alleviation of it. If a man is provoked by blows and other ill uſage to kill the perſon, from whom he receives them, whilſt the ſmart is upon him; ſuch a provocation may be thought to leſſen his guilt: but if he, by ſtriking the firſt blow, was the occaſion of what followed; his guilt would not be leſſened by what he felt himſelf at the time of committing the fact, and by the provocation to commit it, which he brought upon himſelf.

Meaſure of puniſhment how adjuſted.

XII. By theſe rules we may be aſſiſted in judging how far the guilt of one perſon exceeds the guilt of another; not only where they have committed different crimes, but likewiſe where they have committed the ſame crime. But in judging what puniſhment ſhould be inflicted upon a criminal, another compariſon may be thought neceſſary, a compariſon between the guilt of the criminal and the evil, which is to be inflicted upon him; that we may from thence be enabled to proportion the puniſhment to the guilt.

It is commonly ſaid to be a proper rule of juſtice, that as much as the guilt of one perſon exceeds the guilt of another, ſo much the puniſhment of the former ſhould exceed the puniſhment of the latter. If there was no other exception to this rule, yet it certainly does not come up to the point in queſtion. For in this proportion guilt is compared with guilt, and puniſhment with puniſhment: whereas the queſtion is, what rule we are to obſerve in comparing guilt with puniſhment.

ment. However clear we may think it, that of two perſons, who have committed different crimes, and in different circumſtances, he is to bear the greater puniſhment, whoſe guilt is the greater, and he the leſs puniſhment, whoſe guilt is the leſs; this rule will never help us in determining what particular ſort or degree of puniſhment is to be inflicted upon either of them. We may know certainly, that theft is a crime of greater guilt than ſlander; and conſequently that in like circumſtances a theif may juſtly be puniſhed more than a ſlanderer. But after we know this, the moſt material enquiry ſtill remains undetermined: it will ſtill be a queſtion, whether theft is to be puniſhed with death, or maiming, or ſlavery, or impriſonment, or whipping. There ſeems likewiſe to be a farther exception againſt this rule, which will prevent it from being univerſally applicable. The exception is, that amongſt many crimes, all of which deſerve death, the guilt of ſome is greater than the guilt of others. And if death is a juſt puniſhment for the leaſt of theſe crimes, it is impoſſible to apply this rule in puniſhing the others, which are greater: for the rule directs us to riſe in our puniſhment, as the guilt of the crime encreaſes: whereas when the loweſt of theſe crimes is puniſhed with death, it will be impoſſible to riſe higher in our puniſhment, though the guilt of the other crimes is greater. If theft deſerves death, how are we to puniſh a murderer? if murder deſerves death, how are we to puniſh paricide? — you may think to anſwer this objection by ſurmiſing, that no crime is to be puniſhed with death except murder. But certainly there are many other crimes, which betray ſuch an evil diſpoſition in the perſon, who commits

mits them, that nothing leſs than capital puniſhment can ſecure us againſt him. And if you have a due regard to the authority, which eſtabliſhed the moſaic law, you will find, that your ſurmiſe is not well ſupported, and that God himſelf directed other crimes, beſides murder, to be puniſhed with death. Or if neither of theſe conſiderations will ſhew you, how little is to be ſaid in favour of your opinion, you may aſk yourſelf, whether murder is in all caſes a crime of the ſame guilt? or to ſpeak more properly whether the guilt of paricide is not greater, than the guilt of ſimple murder? If then ſimple murder is to be puniſhed with death, we may go back to the queſtion juſt now aſked, how will you puniſh paricide? It is to be hoped, that you, who are ſo mild in your opinion, as to the proper puniſhment of other crimes, would not be ſo cruel in puniſhing paricide, as to think of adding tortures to death. Or if you ſhould think of doing ſo, you ought to be informed, that your rule, if it would lead you to this, can never be a juſt one. We may torture, where we ſpare life, in hopes of amending the criminals bad diſpoſition; or we may take away life, where there is no hopes of his amendment: but to take away life, which is an effectual ſecurity againſt his offending again, and at the ſame time to torture, when death has made it impoſſible for us to amend him, is no better than an unwarrantable cruelty.

Another rule, which ſeems in ſome ſort to be drawn from the primary end of puniſhment, is, that the evil, which the criminal is made to ſuffer, ſhould be equal to the evil, which he has done. As the end of puniſhing him is to prevent him from doing the like again; we may think it likely, that by putting him into the

place

place of the ſufferer, and making him feel what he has made the other feel, he may be taught, by his own experience, how grievous it is to be born, and may by theſe means be brought to do ſo no more. It is, I ſuppoſe, ſome ſuch rule as this, which they may have in view, who ſeem to be of opinion, that no crime beſides murder ought to be puniſhed with death. And as they ſeem to think it a merciful or rather a favourable rule, ſo there are others, on the contrary, who charge the law of Moſes with exceſſive cruelty for eſtabliſhing retaliation in ſome few inſtances. When theſe latter ſpeak of the penalty of an eye for an eye and a tooth for a tooth, of burning for burning, wound for wound, ſtripe for ſtripe; they aſk in their uſual ſtile of declamation, whether any thing can be imagined more inhuman, than for a man, who has loſt his eye or his tooth in the heat of a quarrel, to go in cool blood and thruſt out the eye or the tooth of his neighbour? But before they impeach the moſaic law of inhumanity for eſtabliſhing ſuch a penalty; they would do well to inform themſelves, whether by that law it was not neceſſary, that there ſhould be ſome malice in the criminal, who had defaced a man, in order to ſubject him to the penalty of retaliation: and if this was neceſſary, we may reply to them, not only that what they talk about the heat of paſſion can be no more than declamation; but that other lawmakers have found great reaſon to carry the puniſhment for crimes of this ſort much higher, and to make the malicious maiming or defacing a man capital. But be this as it will; certainly retaliation, however proper it may be in ſome inſtances, cannot be the univerſal ſtandard of puniſhment. In ſome inſtances ſuch a puniſhment is impracti-

cable,

cable, in others it would be indecent and criminal. An incendiary, who has no houſes or but few goods of his own, cannot be made to ſuffer the ſame evil, which he has brought upon thoſe, whoſe houſes or whoſe goods of great value he has maliciouſly burned. Forgery of a will in the liberty of nature, or treaſon againſt the ſtate in civil ſociety could not be puniſhed by retaliation. The ſame may be ſaid of an adulterer, who has no wife of his own; and if he had one, this ſort of puniſhment, whilſt it endeavoured to correct a crime in one perſon, would engage others in the ſame crime. We need not enumerate any more inſtances: theſe, that have been mentioned, will be ſufficient to ſatisfy the reader, that we muſt look for ſome other meaſure of puniſhment, beſides this of retaliation.

We cannot eaſily find a better meaſure, than what the end of puniſhing ſuggeſts to us. Where we have ſufficient evidence from previous facts, that a man is diſpoſed to injure us; the law of nature allows us to provide for our future ſecurity, by enforcing the criminals duty upon him, or by ſo reſtraining him, as to leave him either no opportunity or no power to tranſgreſs it. This is the end propoſed in puniſhment, which juſtifys us in inflicting it. And certainly the meaſure or degree, in which we may puniſh, can only be determined by that end, which juſtifys us in puniſhing in any degree. Such degrees of puniſhment therefore are conſiſtent with the law of nature, as are found to be neceſſary for obtaining that ſecurity againſt the criminal, which the law of nature allows us to require. The proper degree of puniſhment, if it is to be regulated by this principle, planely admits of ſome latitude. The law of nature does not fix any preciſe point,

below

below which we cannot fall, without inflicting it in too low a degree, and above which we cannot riſe, without inflicting it in too high a degree. On the one hand indeed, there is no hazard of doing wrong: for as puniſhment is only allowed and not preſcribed by the law of nature; a mans right to inflict it, in the liberty of nature, is entirely his own to make what abatements in it he pleaſes. But on the other hand, by inflicting too high a puniſhment we may exceed what is allowable: becauſe we are allowed to inflict no more than our future ſecurity againſt ſuffering by the criminal requires: the right of puniſhing, though it is a mans own to make ſuch abatements in it, as his prudence and clemency may recommend to him, is not his own to carry to any rigour or ſeverity, that paſſion or revenge may prompt him to.

Mercy or clemency how exerciſed.

XIII. [a] There are two ways, in which mercy or clemency may exert itſelf in regard to the puniſhment of criminals. It may either remit the whole puniſhment; and then it is called forgiveneſs or pardoning; or elſe, in the latitude of puniſhing, it may engage us to try the loweſt degree, in order to ſee how far this will anſwer the purpoſe, before we proceed as far as we lawfully might.

If indeed the law of nature enjoyned, that puniſhment ſhould follow a crime, it would be contrary to our duty to pardon a criminal. But ſince this law only allows us to puniſh; or ſince puniſhment is naturally juſt, only becauſe the law of nature does not forbid it; we are left at liberty to judge for ourſelves, whether we ſhall inflict or remit it.

It is a mere fallacy to urge, that puniſhment is

[a] Grot. ibid. § XXXIV. XXXV. &c.

naturally

naturally due to a crime, and conſequently that a juſt man, as he gives all men their due, cannot, conſiſtently with this character, remit a puniſhment or withold it from the criminal. For when puniſhment is ſaid to be naturally due to a criminal, we certainly cannot mean, that the criminal has a right to demand it: we chuſe indeed to ſpeak affirmatively, and ſay, that it is due to him in juſtice; whilſt our meaning is a negative one, whilſt we only mean, that no precept of juſtice is transgreſſed, nothing which is due to him is either taken or witholden from him, when he is made to ſuffer for what he has done. A juſt man therefore may be obliged, if he would act up to this character, ſo to give all men what is their due, as not to withold from them any thing, which they have a right to demand: but it does not follow, that he is obliged to puniſh a criminal, who is in his power; becauſe as the criminal has no right to demand puniſhment, it is not due to him in this ſenſe. If any one has in this caſe a right to demand; he, who inflicts the puniſhment, has a right to demand, that the criminal ſhould ſuffer it; he, who ſuffers it, has no right to demand, that the other ſhould inflict it. The right then of puniſhing, as it is wholly his, from whom the puniſhment comes, may, if he thinks proper, be waved or given up. By giving it up he uſes this right as his own, and in the equality of nature is not accountable to any one for ſo doing.

Indeed a criminal, in this equality of nature, is not very likely to eſcape puniſhment. Where all have a promiſcuous right of calling him to an account; it is a great chance, though one may pardon him, whether all will be equally inclined to clemency. [b] Cain ſeems

[b] Gen. IV. 14.

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to have been ſenſible, how little ſecurity he had in this reſpect; when, after the murder of his brother, he declares himſelf to be afraid, that every one who met him would kill him.

If this branch of clemency is conſiſtent with the law of nature, there can be no queſtion, whether the other branch, which conſiſts in puniſhing in a low degree, is ſo or not. For if we are at liberty to wave our right entirely, we muſt certainly be at liberty to wave it in part, that is, to make ſuch abatements in it, as we ſee convenient. Humanity towards the criminal will commonly perſuade us to exerciſe this part of mercy, to be ſatisfyed with the leaſt degree of puniſhment, that may ſeem ſufficient to reſtrain or correct his bad diſpoſition.

Some circumſtances either of the criminal himſelf, or of the crime committed by him, may juſtify us in not exerciſing this branch of mercy. The principal circumſtance of the criminal is his having repeated the offence frequently, after he has been puniſhed in theſe lower degrees: becauſe this is an evidence, that theſe ſlighter puniſhments are not ſufficient to anſwer the purpoſes, which are deſigned to be brought about by them. His having repeated the offence without ever having been made to ſuffer for it at all, ought however not to check our humanity towards him; ſince it does not then appear, that ſlighter puniſhments would not have amended him, if they had been tryed.

The principal circumſtances of the crime, which will juſtify us in not being ſatisfyed with puniſhing in the loweſt degree, are its being common or its being obvious. When few people are likely to follow the criminals example, or to do as he has done; we have nothing

nothing more to conſider, than his particular caſe: he ſtands, as it were, alone; and if we have reaſon to hope, that the ſlighter ſort of penalties may correct what is amiſs in his diſpoſition, we need proceed no farther, than to inflict ſuch ſlight penalties. But when many run into the ſame crime, and cuſtom may ſeem likely to eſtabliſh the practice of it, if care is not taken to prevent it; there is the greater neceſſity for being as ſevere, as juſtice will allow us to be, in order to deter others, who might be encouraged to offend, if they ſaw, that a man could offend either with impunity, or at the expence of only a ſmall puniſhment. The facility of a crime, or its being obvious to be committed, does not encreaſe the guilt of it: there is no more guilt in offending, where it is eaſy, than where it is difficult; nay in fact the facility of a crime, conſidered in itſelf, may rather ſeem to leſſen, than to encreaſe the guilt: becauſe he, who can take the pains to offend, where great difficulties are in his way, ſhews a ſtronger diſpoſition to offend, than he, who meets with few or no difficulties to oppoſe him. But the guilt of a crime being duly adjuſted, the facility of it is a reaſon, why we ſhould carry our puniſhment of it as high as juſtice will allow of. For where a crime is eaſy and open, it is more likely to be committed, than where it is difficult. And if we puniſh in order to ſecure ourſelves, primarily indeed againſt the perſon offending, but ſecondarily againſt all others; there is more reaſon for puniſhing with all juſt ſeverity, where we are guarded by nothing, but the fear of puniſhment, than where we are guarded by the very difficulties, which any perſon would meet with, who ſhould attempt to injure us.

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We may obſerve, that in civil ſociety lawmakers have this rule in view; when they appoint and eſtabliſh the penalty for breaking a law. As the mercy of an individual, in the liberty of nature, ſhews itſelf in the gentleneſs of the penalty, which he inflicts; ſo the mercy of the law ſhews itſelf in the gentleneſs of the penalty, which it appoints. And it is uſual for civil laws to forbid thoſe crimes, which are the moſt eaſy to be committed, under higher penalties, than thoſe of the like guilt, which are not to be committed without greater difficulty. The mercy of ſome laws, has reſtrained the natural licenſe of puniſhing theft with death, and has eſtabliſhed the penalty of reſtitution with encreaſe, where the theft is committed in the day-time; or with ſlavery, when the theif has not wherewithal to make ſuch an ample reſtitution as is required of him. But in the night-time, thoſe laws leave the theif to the diſcretion of the perſon, whom he robs: that ſo, where it is more eaſy to offend in this way, the perſon offending may run the hazard of ſuffering a higher penalty. Stealing cattle from the paſture, and ſtealing them from the ſtall, are crimes of much the ſame guilt. But the former is a crime more eaſily committed than the latter: and upon this principle the moſaic law puniſhes the former with more rigour, and the latter with more clemency. Five oxen are to be reſtored for an ox, and four ſheep for a ſheep, in one caſe; but a double reſtitution is made the penalty in the other caſe. The law ſays, [c] "If a man ſhall ſteal an ox or a ſheep, and kill it or ſell it, he ſhall reſtore five oxen for an ox, and four ſheep for a ſheep. If a theif be found breaking up, and be ſmitten that he

[c] Exod. XXII. 1. 2. &c.

die, there ſhall be no blood ſhed for him. If the ſun be riſen upon him, there ſhall be blood ſhed for him; for he ſhould have made full reſtitution: if he have nothing, then he ſhall be ſold for his theft. If the theft be certainly found in his hand alive, whether it be ox or aſs or ſheep, he ſhall reſtore double." The ſuppoſition of his being found breaking up, when, if the theft is in the day-time, only a double reſtitution is required, ſhews that the cattle ſo ſtolen were ſuppoſed to be in ſome place of ſecurity.

What has been here ſaid concerning mercy or clemency is applicable only, where men live in the liberty and equality of nature, or where the right of puniſhing is every mans own, ſo that he may abate the rigour of his demands, or entirely give them up, at his own diſcretion. But in civil ſociety, where the magiſtrate puniſhes, he exerciſes the right of the public. His mercy therefore is to be guided by what he reaſonably preſumes to be the will of the public, and not by what he might be willing to do, if he was exerciſing only his own private right of puniſhing.

How the goods of a criminal are affected by puniſhment.

XIV. As we have here had occaſion to mention a puniſhment by double or fourfold or fivefold reſtitution, it may be proper for us to ſtop a while in order to conſider, whether in the liberty of nature the perſon, who puniſhes, particularly if he is likewiſe the perſon, who has ſuffered by the crime, has any right to take poſſeſſion of the criminals goods, or acquires any property in them, in conſequence of the right to puniſh, beyond what is ſufficient to make him ſatisfaction for ſuch damages, as he has ſuſtained. In civil ſociety puniſhments by fines, or by confiſcation, are very uſual; and in ſome countries, the law may direct, that what

is

is thus taken from the criminal ſhall go to the ſufferer: as we find the moſaic law provided in the inſtances juſt now taken notice of.

How the civil magiſtrate comes by the general power of puniſhment, and how he comes by this particular power over the criminals goods, will be the proper ſubject of ſome of our future enquiries. At preſent we are only to enquire how a criminals goods are affected by the right of puniſhing in the liberty or equality of nature; where there is no magiſtrate, in whom the excluſive right of puniſhing is veſted, but this right belongs promiſcuouſly to all.

It is plane, that loſs of goods may bring about the ends of puniſhment ſeveral ways. Such a loſs as this, like any other evil, which the criminal is made to feel, may teach him to behave better for the future, for fear of ſuffering ſuch another loſs, if he has ſtill any thing left to loſe. Where many of his goods are taken from him, ſo as to reduce him to a low condition; he will have fewer opportunities of offending, than he had, whilſt he had enough to maintain him in idleneſs. And theſe opportunities will be more particularly leſſened, if his riches, whilſt he had them, were either the principal motives to his crime, or the chief inſtruments, that helped him or gave him the power to commit it. Since then the ends of puniſhing may thus be anſwered by deprivation of goods; if we have any right to make a criminal ſuffer at all for theſe ends, we muſt have the ſame right to make him ſuffer in his goods, as to make him ſuffer directly or immediately in his perſon.

But the great queſtion is, when the criminal is deprived of his goods, who has the property in them?

They cannot naturally paſs to his children or relations, if inheritance is not a right of the law of nature. Nay, though inheritance was ſuppoſed to be natural, or though it had in a ſtate of nature been introduced or eſtabliſhed by general conſent; yet even then his children or relations could not, in virtue of ſuch a right, claim to inherit the goods, which he loſes. For inheritance is not a right to claim property in ſuch things, as belonged to the anceſtor, whenever his property in them ceaſes; it is only a right to claim property in ſuch things, as he leaves the heirs in poſſeſſion of, when his own property ceaſes by death. So that before his death, there can be no claim of inheritance upon any of his goods; and at his death there can be no claim of inheritance upon ſuch of his goods, as he does not leave them in poſſeſſion of. And he certainly no more leaves them in poſſeſſion of thoſe goods, which he has been juſtly deprived of in his life-time, than he does of thoſe, which he has ſold, or given away.

As the heirs of the criminal have no claim to ſuch goods, as he loſes in the way of puniſhment; ſo neither has the injured perſon any, conſidered merely as the injured perſon. He has indeed a right to ſo much of the criminals goods, as will make him amends for the damage, which he has ſuffered: but no reaſon can be given, why he ſhould have a right to more; unleſs ſome poſitive law has given him ſuch a right. The ends, which juſtify puniſhment, will by no means extend his claim any farther than this. The criminal, by ſuffering in his goods, may be diſcouraged or prevented from offending again: but a deſign to diſcourage or prevent him from offending again can be no ground for that perſon, whom he has injured by offending once, to claim property in the goods, which he is deprived of.

of. The ends of puniſhment may be anſwered by taking the criminals goods from him: but theſe ends do not require, that the property, which he loſes, ſhould be veſted in the perſon, whom he has injured.

The perſon, who puniſhes, whether it is the ſame, that has been injured, or any one elſe, ſeems moſt likely to have, or rather to acquire, a right in ſuch goods: not becauſe he is at the trouble of puniſhing; but becauſe, when he deprives the criminal of his property in them, he has the faireſt opportunity of being the firſt occupant. The perſon, who undertakes to puniſh a criminal, has another opportunity, beſides this, of acquiring a right in the criminals goods. Moſt of the evils, which the criminal can ſuffer in his perſon, may be eſtimated in money or in goods; and he probably would willingly ſubmit to loſe as much money, or as many of his goods, as would make the evil, which he ſhould feel by ſuch loſs, equal or nearly equal to the evil of ſome other puniſhment. Suppoſe for inſtance the puniſher might impriſon him, and he would readily give a ſum of money rather than loſe his liberty: in this caſe by his own voluntary act he might give the puniſher a certain ſum of money, in order to redeem himſelf from impriſonment; that is, he might chuſe to bear one ſort of puniſhment, rather than another: and, in conſideration of the puniſhers being willing to change the ſort of puniſhment, he might make over his right to that ſum of money, or to any other of his goods of the ſame value.

After a number of men have originally acquired a general property, as a collective body, in all ſuch things, as are diſtributed afterwards by that body amongſt the particular members of it, and ſo become the private

property of each individual, to whom they are thus diſtributed and aſſigned; we may, notwithſtanding this, ſuppoſe each individual in reſpect of puniſhment to be ſtill in a ſtate of nature; that is, we may ſuppoſe the right of puniſhing to belong promiſcuouſly to each of them. Whoever in theſe circumſtances puniſhed a criminal with loſs of goods, could have no right to theſe goods, unleſs by way of commutation. If nothing has paſſed between the puniſher and the criminal, except that the former has merely deprived the latter of his goods; ſuch goods have then no particular owner: and if the puniſher could claim them at all, he muſt claim them as the firſt occupant. But where a right of general property in the public or collective body obtains; ſuch goods, as have no particular owner, do not ceaſe to have any owner at all; they revert to the public or collective body, and are not ſo in common, as that any one, who pleaſes, may lawfully ſeize them for his own, and acquire property in them by ſuch occupancy. Suppoſe ſuch a collective body of men to have approached a little nearer to the forms and inſtitutions of civil ſociety, and to have made over their general property to ſome one or more particular perſons: then as all goods, which have no other owner, ſo thoſe amongſt the reſt, which a criminal is deprived of in the way of puniſhment, will become the property of ſuch perſon or perſons; that is, in the more common way of ſpeaking, the goods of a criminal will, as a puniſhment for what he has done, be forfeited to him or them; when deprivation of goods is the proper puniſhment of his crime, and any one thinks fit to inflict that puniſhment.

XV.

XV. We have ſeen, that juſtice will allow us to puniſh the perſon, who commits a crime: but it may ſtill be aſked, whether we can, conſiſtently with the ſame juſtice, puniſh any others beſides him. [d] This queſtion relates to two ſorts of perſons; to ſuch as are parties in a crime, though they are not the immediate doers of it; and to ſuch, as have neither done the criminal act, nor are any ways concerned in it. Acceſſories to a crime puniſhable.

As to the firſt ſort of perſons, thoſe, who are parties in the crime; they are planely liable to puniſhment; not for the guilt of another man, but for their own guilt; not becauſe a criminal act has been done by ſome one elſe, but becauſe they had a ſhare or were acceſſories in what that other perſon has done. The ſeveral ways, by which we may ſo far make ourſelves parties in doing an injury, as to become parties likewiſe in the obligation to make ſatisfaction for the damages ariſing from that injury, have been already explaned. By the ſame ways a man may make himſelf ſo far a party in a crime, which another commits, as to be juſtly liable to be puniſhed for it. They, who command a crime, who conſent to it, when without their conſent it could not have been committed, who aſſiſt the immediate actor in committing it, or who protect him, after it is committed; they, who are in ſtrict juſtice obliged to forbid the crime, and do not forbid it, who are in like manner obliged to aſſiſt the ſufferer, and wilfully neglect to aſſiſt him; they, who adviſe, or encourage, or countenanee, what is done; and they, who ought to diſſuade the crime, but do not diſſuade it, or who ought to make it known, but conceal it; any of theſe are parties in it, or acceſſories

[d] Grot. L. II. C. XXI. § I.

to it: and if they have ſuch a ſhare in it, as evidences any evil diſpoſition, they become liable to puniſhment.

It is however to be obſerved, that a man may be ſo far acceſſory to a crime, as to be obliged to make good the damage ariſing from it, without being liable to ſhare in the puniſhment due to the guilt of it. Every neglect of juſtice, though in the ſlighteſt inſtances, obliges him to make reparation: becauſe juſtice, even in the ſlighteſt inſtances, is what all mankind may claim of him. But puniſhment is inflicted to correct a bad diſpoſition, or to prevent it from breaking out into future acts of injuſtice: and it is very poſſible, that through inadvertence, or by accident, a man may be the occaſion of harm to others in the lower inſtances, without having ſuch a bad diſpoſition, as to ſtand in need either of correction or reſtraint.

In puniſhing a criminal and his acceſſories; when they, by whoſe authority or at whoſe inſtigation he committed the crime, can be found out, and are in our power; it is generally thought reaſonable, that we ſhould be more ready to mitigate or to remit his puniſhment than theirs. The crime is ſuppoſed to begin from them; and we are willing to hope, that unleſs they had commanded or inſtigated him to do what he has done, the fact might never have been committed. But certainly this rule will in many caſes be a very improper one. He, who is under the ſtrongeſt temptation to commit a crime, has the leaſt guilt; and whether we conſider him as an object of our mercy or not, yet in point of juſtice he deſerves the leaſt puniſhment. Now it frequently happens, that his provocation, from whom the crime begins, is much greater than his, who carries it into execution. I may have provoked

provoked a man by ſome extreme ill uſage, which puts him upon hiring an aſſaſſin to murder me: the guilt of the aſſaſſin who is prevailed upon by a ſmall reward to commit the fact, is planely the greater of the two: for he, who can be brought ſo eaſily to commit a crime, muſt have a worſe and a more dangerous diſpoſition of mind, than he, who does not appear likely to have thought of committing it, if he had not been under the influence of a great provocation.

Thoſe, who have no ſhare in a crime, not puniſhable.

XVI. [e] The principles already eſtabliſhed, concerning the ends and the right of puniſhing, will ſufficiently prove that they, who are no ways concerned in a crime, cannot with any appearance of juſtice be puniſhed for it. If puniſhment is juſtifyable upon no other principle, but a deſign of correcting or reſtraining a diſpoſition to hurt mankind; then where there is no crime to evidence ſuch a diſpoſition, that is, where there is no guilt, there can be no juſtice in inflicting puniſhment.

We do not indeed maintain, that no puniſhment can be juſtly inflicted upon a criminal, which ſhall, in any manner or by any accident whatſoever, affect an innocent perſon. Mankind are ſo connected with one another, that, if this was a true principle, it would be almoſt impoſſible to puniſh a criminal at all: for there is ſcarce any puniſhment, which can be inflicted, but what, by ſome accident or other, will in its conſequences affect other perſons, beſides him, upon whom it is inflicted. No one is ſo much a ſolitary individual, as to be, in all reſpects, quite detached from the reſt of his ſpecies: either our intereſts are mixed with the intereſts

[e] Grot. ibid. § IX. X. XI. XII.

of

of others, or at leaſt there are ſome, with whom we are connected by ties of affection. The death of a parent will commonly hurt his children; both upon account of the intereſt, which they had in his life, and upon account of the affection, which they had for his perſon. He cannot be maimed or impriſoned without their feeling it: they loſe at leaſt that pleaſure, which they enjoyed from his company or his welfare, and are perhaps deprived of that maintenance, which they received from his labour. Even any corporal pain, though he is the immediate ſufferer, affects them: it is a pain to them, that he ſhould be hurt: and what is a diſgrace to him, is, however we may reaſon about it, a diſgrace to his family in the opinion of the world. Where a man is not attached to others by natural affection, he has many other connections, which will extend the conſequences of his puniſhment to them. If he is in debt, and has no way of ſatisfying his creditors, but either by his labour, or by his going on in ſome gainful employment, which he had entered into, and which they perhaps had hazarded their money upon; his death, or his impriſonment, or his baniſhment, will be a loſs to them. If he is a ſlave, his maſter will be a ſufferer; if he is a maſter, his dependents will be ſufferers; when any of the higher puniſhments are inflicted upon him. But the loſſes or evils, which any of theſe innocent perſons undergo, in conſequence of a criminals puniſhment, is not a puniſhment to them. They ſuffer indeed; but they muſt look upon what they ſuffer as a natural misfortune, which was brought upon them, not directly by the deſign of thoſe, who inflict the puniſhment, but in conſequence only of their accidental connections with the criminal, upon whom it is inflicted. All puniſhment

ment may indeed be conſidered as ſome loſs to them, who ſuffer it: but then all loſs is not on the contrary to be conſidered as a puniſhment. Whatever loſs we deſignedly and directly bring upon a man, if we do it upon account of ſome crime, that he has committed, it is a puniſhment; if we do it without any previous crime, it is an injury. Nay even ſuch loſs, as we bring upon a man in conſequence of what we do, is an injury; if the act from whence this loſs ariſes is an unlawful one. But the loſs, which an innocent perſon ſuffers by the puniſhment of a criminal upon account of the accidental connection, that there is between ſuch perſon and the criminal, is not of either of theſe ſorts. It is not directly or deſignedly brought upon him: nor is it the conſequence of any act, which is in itſelf unlawful. He ſuffers it in conſequence only of our doing what, in reſpect of the criminal, we had a right to do.

What has been already ſaid may help to clear up the queſtion, whether a criminal may juſtly be deprived of his goods, ſince they are by this means prevented from deſcending to his children, notwithſtanding theſe children have no ſhare at all in the guilt of his crimes. This puniſhment is, in this reſpect, no more exceptionable than any other puniſhment would be: ſince, as we have ſeen, in almoſt every other ſort of puniſhment, his children and all others, who are connected with him, muſt in ſome degree or other ſuffer with him. And upon the ſame principles, that we juſtify any other ſort of puniſhment, we may juſtify this, in which the loſs ſuffered by the children is not directly or deſignedly brought upon them, but only in conſequence of our doing an act in itſelf lawful.

I am aware however, that this explanation of the matter is open to an objection. It may be aſked, whether in calling the act a lawful one, which is attended with this conſequence, we do not take the point in queſtion for granted? The loſs, which the children ſuſtain, though we do not think fit to call it a puniſhment, may yet be an injury: as all loſſes are, which any innocent perſon ſuffers in conſequence of our doing, what we ought in juſtice not to do. And to ſay, that our act of puniſhing a criminal, by deprivation of goods, is in itſelf a lawful one, is taking it for granted, that the act is lawful, notwithſtanding the certain conſequence of it is, that an innocent perſon will be hurt by it. However, this objection is not a very formidable one: for when we ſay, that the act is in itſelf a lawful one, we conſider it as detached from this conſequence. In the firſt place we may affirm, what has been proved already, that it is lawful to puniſh a criminal. And in the next place, we may affirm, that if a criminal was a ſolitary individual, who had no children and no relations at all, to whom his goods would deſcend at his death; it would be lawful to puniſh him by deprivation of goods. And if the act is lawful thus far; the conſequences, which are not directly deſigned by him, who does it, but follow by the accidental connection between the criminal and his relations, are not chargeable upon him, as an injury to thoſe relations.

Children have a right to maintenance from their parents; they have a right likewiſe to the pleaſure, which they receive from the company, the ſafety, and the welfare of their parents. Now there is ſcarce any ſort of puniſhment, but what will in ſome degree or other affect the children, when it is inflicted upon the parent. And yet

yet we never hear the ſame complaints about the injury, which is done to the children, by puniſhing the parent in any other way, that are uſually made about the puniſhing of him by deprivation of goods. Every one ſeems to be aware in other inſtances, that the loſs ſuſtained by the child is accidental, and that the view of what it muſt ſuffer, by the puniſhment of its parent, is not ſufficient to make ſuch puniſhment unjuſt. Though in fact the loſs, which is ſuffered by the child in other inſtances, affects what may with more propriety be looked upon as its right, than the loſs which it ſuffers in the inſtance of taking away the parents goods. For the child has no more than an expectation of ſucceeding to his goods; and this expectation depends upon the condition of his keeping thoſe goods, till he dies. So that by depriving the parent of his goods, inſtead of taking away any right from the children, we only intercept the condition, without which they can have no right at all to them. [f] Puffendorff, after he had come to this concluſion, goes on to obſerve, that it was however, as Buchanan calls it, a truly unjuſt and barbarous law, which was made by Mogaldus king of Scotland, that all the goods of condemned criminals, were to be forfeited to the crown, excluding their wives and children from any part of them. If he does not uſe the word *unjuſt* in its ſtrict and proper ſenſe, it will be eaſy to reconcile what he here ſays with his former concluſion. For though the rigour of juſtice will allow of this; yet it might ſtill be his opinion, that tenderneſs and humanity would perſuade us to let the wife and children of the criminal enjoy, if not the whole, yet however ſome part of his goods.

[f] B. VIII. Chap. III. § XXXI.

But perhaps he had in his mind another objection to ſuch a law as this; an objection, which does not ſeem to have been much attended to. Though deprivation of goods may be juſtifyed, even againſt any ſuppoſed injury to the children of the criminal; when this is the only puniſhment, which he is made to ſuffer; yet it is ſtill a queſtion, whether he may be puniſhed by death and by deprivation of goods too? All the reaſons, upon which the juſtice of puniſhment is ſupported, are ſatisfyed by the death of the criminal. He is effectually prevented from offending again, when his life is taken from him. And as we ſhewed before, upon this principle, that all unneceſſary torture, that is, all pain, which might have been avoided in putting the criminal to death, is an injury to him; ſo here it may be aſked, whether the accumulated puniſhment of death and deprivation of goods is not upon the ſame account to be looked upon as an injury?

If this was the whole of the objection; we might eaſily reply, that deprivation of goods added to death is not like unneceſſary torture added to it. The criminal feels the unneceſſary torture; and becauſe he is then capable of feeling it, he is likewiſe capable of being injured by it. But deprivation of goods is more like expoſing or mangling his body, after it is become inſenſible: if it is at all to be called taking his goods from him, it is taking them from him, after he has no longer any occaſion for them, and can no longer feel the loſs of them.

But here the caſe of the children returns, and gives new force to the objection. If they have a claim to inherit what their father dies poſſeſſed of; then to ſeize upon the goods of the father at his death, though it is no injury

injury to him, will be an injury to them: becauſe in this caſe ſeizing his goods is not merely intercepting the condition, upon which the children had a claim to them; it is taking the goods away in oppoſition to their claim.

Shall we ſay, that it is of great uſe for men to have a puniſhment of this ſort before their eyes: ſince though they might be hardy enough to offend, where they themſelves are to ſuffer alone; yet their affection for their children will probably prevent them from offending, where they foreſee, that if they do offend, theſe children muſt ſuffer with them? But when we are enquiring about the juſtice of inflicting a puniſhment, after a crime is over; it is nothing to the purpoſe to give an anſwer drawn from the expediency of threatening a puniſhment before the crime is committed. It might be of great uſe to threaten, that if a man committed ſuch or ſuch a crime, his children ſhould be tortured or be put to death before his eyes; and doubtleſs to inflict a puniſhment of this ſort in ſome inſtances, might be of great uſe in preventing others from offending. But the expediency of ſuch a proceeding would never ſhew the juſtice of it. However juſt it might be, in reſpect of the parent, who upon account of his crime is made to ſuffer the anguiſh of ſo horrid a ſpectacle; yet certainly it never could be thought juſt, in reſpect of the children, who are thus made to ſuffer torture or death, notwithſtanding they are clear from the guilt of their parents crime.

Shall we ſay, that inheritance is an inſtituted right; and that conſequently, in a ſtate of natural liberty, no injury is done to the children in cutting them off from inheritance; becauſe they had no right to claim it;

and

and that in a ſtate of civil ſociety, thoſe, who inſtitute the right of inheritance, may model it as they pleaſe, and may convey the goods of the father to his children, upon ſuch conditions, as ſeem to them to be moſt convenient. They may therefore, in view to the expediency of ſuch eſtabliſhment, appoint, that, where the father has been guilty of ſuch or ſuch crimes, all inheritance as derived from or through him ſhall be cut off; and then, in conſequence of this eſtabliſhment, what in the firſt inſtance was expedient only, becomes juſt: the child is not injured by this bar of his claim to inherit; becauſe if the ſame laws, from which this bar ariſes, had not given him a claim to inherit, he would have had no ſuch claim at all. This anſwer may be a ſatisfactory one, where the children have no right to the goods of their parents but by inteſtate ſucceſſion. But it is planely an inſufficient anſwer; if the parent, or other anceſtor, has been careful enough to make a will. For however inheritance in inteſtate ſucceſſion may be the creature of civil inſtitution; inheritance by will is coeval with property.

Shall we ſay therefore, that property itſelf and all the incidents of it, the power of making a will amongſt the reſt, is the effect of civil inſtitution? This would be ſaying what cannot well be proved to be univerſally true.

But where property is conſidered as acquired in the groſs and as derived from the public to the individuals, in whom ſeparate or private property is veſted; the public might certainly make the grant of it to ſuch individuals upon ſuch terms and under ſuch conditions, as ſeemed to be moſt expedient, or moſt conducive to the common good.

But

But even then it is to be remembered, that a general grant of property to the individuals can never be underſtood to be any bar to their diſpoſing of their goods by will; unleſs this limitation is particularly mentioned. For as the right to diſpoſe of our goods by will is naturally incidental to property; whoever grants the one, does at the ſame time grant the other; if no expreſs condition is annexed, which may prevent it.

Upon the whole then we may come to theſe concluſions. Where a criminal is puniſhed with death, ſuppoſing inheritance in inteſtate ſucceſſion to be the creature of civil inſtitution, the children, or other relations of ſuch criminal, have no claim to his goods, in the liberty of nature; and conſequently deprivation of goods can have no injuſtice in it. It cannot be unjuſt in reſpect of the criminal; becauſe, after he is dead, he does not feel the loſs of them. And it cannot be unjuſt in reſpect of the children; becauſe in reſpect of them it is not properly deprivation; it does not take from them any thing, which they had a right to; it only prevents them from poſſeſſing what did not belong to them, any more than to any other perſon. — But though inheritance in inteſtate ſucceſſion is ſuppoſed to be introduced by civil ſociety, and to be eſtabliſhed by poſitive laws; yet inheritance by will is incidental to property and coeval with it: and conſequently, where a criminal is puniſhed with death in the liberty of nature, whoever claims his goods by will would be injured, if they were hindered from ſucceeding to them.—And though we conſider civil ſociety as in its infancy, which is the caſe where a body of men have the property of lands in groſs, and individuals derive their private property from the grant of ſuch body; yet this principle would not be

ſufficient to juſtify depriving the heir of a claim under the will of the anceſtor; unleſs where it was otherwiſe provided by ſome expreſs conditions annexed to the grant.

However we are to obſerve farther, that in civil ſociety the eſtabliſhed laws, to which, as we ſhall ſee hereafter, all the ſubjects conſent, either mediately or immediately, operate in the ſame manner with ſuch expreſs conditions. Whether thoſe conditions are made at firſt, or are introduced with conſent of parties afterwards; there is no injury on the ſide of the community, which makes uſe of them, as a reſtraint upon the behaviour of the ſubjects. So that in civil ſociety, by virtue of the laws, the power of making a will may, conſiſtently with juſtice, be taken away from criminals, who are puniſhed capitally.

There is another caſe, in which ſuch perſons, as are innocent of a crime, ſeem to be puniſhed for it; and that is where the guilt of the criminal is the remote cauſe, but ſome act of their own is the immediate cauſe of the evil, which they ſuffer. He, that engages either for the appearance of a criminal, when he ſhall be called upon, or for his future good behaviour, becomes anſwerable for ſuch appearance or ſuch behaviour, and makes himſelf liable to undergo the penalty, under which he engaged for either. The guilt of the criminal ariſing from ſome crime formerly committed, which made him liable to be called upon, in one inſtance, or his guilt ariſing from ſome future miſbehaviour, in the other inſtance, is the remote cauſe, which ſubjects the ſponſor to undergo what he voluntarily engaged to undergo, upon condition the criminal failed of appearing, or of behaving well. But the immediate cauſe, which involves

involves the ſponſor in the obligation to undergo ſuch evil, is his own voluntary act of engaging under this condition.

It is evident, that what the ſponſor ſuffers is owing to his own voluntary act, and not to the guilt of the criminal; becauſe the meaſure of what he is to ſuffer is determined by his own engagement and not by the others guilt. Whatever may be the guilt of the criminal; this conſideration does not affect the ſponſor: what he is to undergo is neither more nor leſs, than he voluntarily engaged to undergo. Upon this account it is, that he, who thus gives ſecurity for another cannot forfeit his life, as a penalty; when the conditions, that he engaged for, are not made good. He cannot forfeit his life, becauſe he can forfeit no more, than he had pawned or pledged as a ſecurity: and he can pledge nothing, but what he has a right to diſpoſe of. Now a mans life is not his own to diſpoſe of: and conſequently, as he cannot pledge it in ſecurity, he cannot forfeit it; when the conditions, which he engaged for, fail of being performed. The antients ſeem to have been of another opinion: the ſponſor might in their judgment ſuffer capitally. And there is a plane reaſon why they might be of this opinion, notwithſtanding they acted upon the principle here laid down, that the ſponſor ſuffers immediately on account of his own engagement, and not on account of the criminals guilt; and conſequently, that he can forfeit no more than he pledges, and can pledge no more, than he has a right to diſpoſe of. For in the mean time they looked upon every man to be abſolute maſter of his own life, not only to keep or preſerve it, but to diſpoſe of it too, as he pleaſed. They allowed the ſponſor therefore, if he

thought fit, to put himſelf in all reſpects into the place of the criminal, ſo as to ſubject himſelf to ſuffer capitally; if it appeared upon enquiry, that the criminal deſerved ſo to ſuffer.

Obligation to puniſhment does not deſcend from the anceſtor to the heir.

XVII. [g] We have already had occaſion to obſerve, that the children or heirs of a criminal cannot juſtly be puniſhed, upon account of the guilt of their parent or anceſtor; provided they have no ſhare in this guilt. It may not be amiſs, before we leave this ſubject, to take notice of the reaſon, why the obligation to undergo puniſhment does not, like ſome other obligations, deſcend from the anceſtor to the heir. Guilt, or a diſpoſition to do harm, is a perſonal quality; and conſequently the obligation, which ariſes from it, muſt be merely perſonal. As the guilt is in the perſon and not in the goods; the heir, to whom thoſe goods deſcend, receives them without that obligation of puniſhment, which the anceſtor was under. But though the heir ſtands clear of the puniſhment itſelf, that is, though if the puniſhment was not inflicted, or at leaſt was not ſettled and determined, before the death of the anceſtor, the heir will naturally not be liable to it; yet if it was inflicted, or however was fixed, before his death, the heir will in conſequence be affected by it, as far as it affects the goods of his anceſtor. For the heir can receive theſe goods in no other condition, than the anceſtor leaves them: ſo that if any fine or any forfeiture has diminiſhed them, he can claim no more than the remainder: or if the fine or forfeiture has been ſettled in the anceſtors life-time; though the one has not been actually paid, nor the other actually ſeized on; they are due from the goods of the anceſtor; the obligation no longer reſts upon his perſon, but is

[g] Grotius ibid. § XIX.

ex-

extended to his property. Conſequently the heir, to whom ſuch property deſcends, receives it charged with this obligation, and is bound to give up what he can have no claim to, becauſe his anceſtor had none.

In explaning this matter I have ſuppoſed the heir to be affected by the conſequence of the anceſtors puniſhment, not only when the puniſhment of a fine or a forfeiture has been actually inflicted before the anceſtor happens to die, as where the one is actually paid, and the other actually ſeized upon; but likewiſe when ſuch puniſhment has been ſettled and determined, though it has not been actually inflicted. But in the liberty of nature this latter ſuppoſition cannot well take place: for where there is no common judge to decree the fine or forfeiture, they cannot eaſily be ſettled and determined any otherwiſe than by an actual payment of the former, or an actual ſeizure of the latter. It may indeed poſſibly be otherwiſe; the puniſher and the criminal may by mutual agreement have ſettled this matter: and then the ſuppoſition will take place, even in the liberty of nature. Though the criminal has not actually been deprived of the poſſeſſion of ſuch goods, as he had agreed to give up in the way of puniſhment, or rather in the place of other puniſhment, yet the obligation ariſing from his crime is, by ſuch agreement, extended beyond his perſon, and affects his goods.

This may frequently happen in a ſtate of civil ſociety. After the magiſtrate has decreed the fine or forfeiture, whether the criminal directly agrees to it or not, they become due, ſo as to affect his goods, and to make the heir anſwerable; if it ſhould happen, that the ſentence is not put in execution before the anceſtors death.

CHAP. XIX.

Of War.

I. *War, what it is.* II. *Private war what.* III. *War is naturally lawful.* IV. *Who may lawfully engage in making war.*

War, what it is.

I. WAR[h] is a contention by force. When we call war a contention, we muſt not be underſtood to uſe this word in ſo reſtrained a ſenſe as to mean by it only the act of contending. Nations are ſaid to be at war with one another, not only when their armies are engaged, ſo as to be in the very act of contending; but likewiſe when they have any matter of controverſy or diſpute ſubſiſting between them, which they are determined to decide by the uſe of force, and have declared by words, or ſhewn by certain actions, that they are determined ſo to decide it. War therefore, in the common uſe of the word, ſignifies not only an act but a ſtate or condition. And upon this account the word contention, in this definition of war, is to be underſtood to ſignify the ſtate or condition of thoſe, who, though they are not actually making uſe of force, have ſome matter of diſpute ſubſiſting between them, which can be decided by no other means, and who are therefore determined to take every fair opportunity of uſing theſe means for the deciſion of it.

Private war what.

II. [i] If this is the notion of war; it is plane that there may be war, in the liberty of nature, before the inſtitution of ſuch civil ſocieties, as we call nations. War of this ſort is private war: becauſe, antecedently to the

[h] Grotius Lib. I. Cap. I. § II. [i] Grot. ibid.

forming

forming civil ſocieties or bodies politic, which bodies are called public perſons, the parties concerned in war muſt be private perſons. Even after ſuch public perſons are formed, the right of private war is only abridged, and is not wholly taken away; as will be ſhewn in its proper place.

Our principal enquiries at preſent are contained within a narrow compaſs: they are only theſe two; firſt whether, in the liberty of nature, individuals may lawfully make war upon one another; and ſecondly, ſuppoſing ſuch war to be lawful, who are the perſons, that may lawfully engage in it.

War is naturally lawful.

III. [k] What has been proved already, concerning the right of defence, the right of recovering reparation for damages done, and the right of inflicting puniſhment, will ſerve to ſhew, that an injury will juſtify men in making uſe of force, both before and after it is committed. An injury juſtifies the uſe of force, before it is committed; in order to guard againſt it: and it juſtifies a like uſe of force, after it is committed; in order either to recover what is loſt by it, or to hinder him, who has done it, from doing the like again. Now the uſe of force is war: and conſequently the law of nature, ſince it allows the uſe of force for any of theſe purpoſes, allows of war.

Who may lawfully engage in making war.

IV. [l] Though the war, which we are now ſpeaking of, is the war of individuals againſt each other; yet the law of nature does not hinder any number of individuals from taking part in it. The perſon, whoſe intereſt is immediately concerned, either to defend himſelf and his property, or to recover reparation of damages, or to inflict puniſhment, is not the only

[k] Grotius Lib. I Cap. II. § I. [l] Grot. Lib. I. Cap. V.

perſon, who may lawfully make uſe of force for his own ſecurity. This has been proved already in the inſtance of inflicting puniſhment. For as the right of doing this belongs promiſcuouſly to all, who may ſuffer by the criminal, if he is not reſtrained; any number of perſons, where any one or ſome few of them have not force ſufficient to inflict the puniſhment, may joyn their force together for this purpoſe: what is lawful to each of them ſeparately is equally lawful to all of them, when they are thus united. In reſpect likewiſe of defence or of reparation, though it is more particularly the intereſt of him, who is in danger of ſuffering, or who actually has ſuffered, to guard againſt the injury in one caſe, or to enforce the demand of reparation in the other caſe; yet where he is engaged in ſuch a lawful act, as either that of defending himſelf, or that of recovering damages, no rule of juſtice can forbid or reſtrain others from giving him their aſſiſtance. Nay where his ſufferings are likely to be very great, or have been very great already, and his own abilities, either to ward off the evil, which threatens him, or to redreſs it, after it is over, are but ſmall; benevolence would rather perſuade thoſe, who have an opportunity of being ſerviceable to him, not to refuſe or withold what help they are able to give him. From hence it appears, that war is lawful to two ſorts of perſons; either to him, whoſe intereſt is immediately concerned, or to them, who voluntarily give him aſſiſtance.

But there is ſtill a third ſort, concerning whom it may be enquired, how far they may lawfully engage in a war: and theſe are ſuch, as have no intereſt in the

the occaſion of it, and, if they were left to chuſe for themſelves, would take no part in it; but being under the authority of him, whoſe intereſt is immediately concerned, they are commanded by him to give their aſſiſtance. The caſe of ſuch perſons, as theſe, will come more particularly under our conſideration in the ſecond part of this work, when we are to enquire into the effect of civil juriſdiction upon our natural rights. Only we may here obſerve, by the way, that as a ſon, who continues in his fathers family, or a ſervant, who has bound himſelf by agreement for this purpoſe, is obliged to obey the lawful commands of the father or the maſter; the conſequence is, that when ſuch father or maſter undertakes a lawful war, the ſon or the ſervant may lawfully aſſiſt him, and are indeed obliged to aſſiſt him, if he commands them.

CHAP.

CHAP. XX.

Of Slavery.

I. *Perfect deſpotiſm and perfect ſlavery what.* II. *Difference between deſpotiſm and parental power.* III. *No man is naturally a ſlave.* IV. *Cauſes of ſlavery.* V. *Limitations of deſpotiſm.* VI. *Slavery how the conſequence of juſt war.* VII. *Children of ſlaves, why they follow the condition of their mother.*

Perfect deſpotiſm, and perfect ſlavery what.

I. [m] GRotius, in defining perfect ſlavery, calls it an obligation to give all our labour for a ſupply of the bare neceſſaries of life.

But the common notion of perfect ſlavery does not ſeem to be fully expreſſed in this definition of it. We uſually underſtand the maſter or owner to have, not only a right to direct ſuch actions of the ſlave as may properly be called labour, but a right likewiſe to direct all his other actions. And from this right, to direct all the actions of the ſlave, there ariſes a right by gift or ſale to diſpoſe of the ſlaves perſon; that is, to transfer the power over him. For the ſlave, being ſuppoſed under the abſolute authority and direction of his maſter, muſt, in conſequence, be obliged to ſubmit to the authority and direction of another, whenever his preſent maſter is pleaſed to order that it ſhall be ſo.

Perfect deſpotiſm ſeems therefore in the common notion of it, to be an alienable right to direct all the actions of another. And conſequently perfect ſlavery is an obligation to ſubmit to be thus directed.

Difference between deſpotiſm and parental power.

II. The different ends, to which the power of a maſter and the power of a parent are directed, will

[m] L. II. C. V. § XXVII.

ſufficiently

ſufficiently diſtinguiſh them from one another: though both of them are abſolute; and though one of them extends to all the actions of the child, as the other extends to all the actions of the ſlave. The good of the child is the end, to which the authority of the parent over the child is directed: and the good of the maſter is the end, to which the authority of the maſter over the ſlave is directed. The parent has no right to command the child, but in view to the benefit of the child itſelf: the maſter has a right to command the ſlave to do ſuch actions, as are for the maſters benefit: ſo that however the ſlave may find his account in obeying his maſters commands, this is merely accidental; ſince the maſters right to give theſe commands has another purpoſe principally in view.

But though the maſters power is not directed to the ſame end, and conſequently is not tempered by the ſame limitations with parental authority, yet it is ſubject to ſeveral other limitations. We ſhall beſt underſtand what theſe limitations are, after we have conſidered the original of the maſters power and the ſlaves ſubjection.

III. Though it may be poſſible for a man to be a ſlave from his birth; yet no man is naturally a ſlave. They who are ſlaves from their birth, muſt have been made ſuch by ſome accident, which happened before they were born; ſlavery is by no means their natural condition. Nature has indeed made a difference between the parts and capacities of mankind: ſome are better able to judge for themſelves, and to purſue their own good, than others: but though this difference of parts and capacities may have made it more convenient for ſome to be directed, and for others to direct; yet it cannot

No man is naturally a ſlave

poſſibly

poſſibly be looked upon as a ſufficient reaſon, why the former ſhould be ſlaves, and the latter be their abſolute maſters. Thoſe, who ſtand in need of the direction of other men, and are willing to have recourſe to ſuch direction, ſtand in need of it for their own benefit, and are led to have recourſe to it by the hopes of advancing that benefit, But ſlavery is an obligation upon a man to be directed in his actions, in view to their benefit, who direct him: it cannot therefore be founded in that difference of parts or abilities, which makes it convenient for him to have recourſe to their direction, in view to his own benefit.

As men are naturally endowed with different degrees of underſtanding and judgment; ſo are they likewiſe naturally poſſeſſed of ſuch different degrees of bodily ſtrength, as will make it poſſible for one man, who is ſtronger, to ſubdue another, who is weaker, and force him to obedience. But whatever ſuperiority in bodily ſtrength we may be born to, though it gives us the phyſical power, it does not give us the right, of compelling another to obey us. The weak mans mind and his body, and conſequently all the faculties of his mind, ſuch as his judgment and his will, and likewiſe all the powers of his body, are as much his own, as if nature had given him greater ſtrength, and enabled him to make a more effectual ſtruggle in his own defence. We cannot therefore claim a right to dictate to him, nor can we act, as we if had a right of forcing him, againſt his inclination, to purſue our intereſt in ſuch manner as we ſhall direct, without doing him an injury, without doing violence to that judgment and will of his mind, and to thoſe active powers of his body, which nature has made his own.

Children

Children are born in a natural ſubjection to their parents. But this ſubjection, has been ſhewn already to be, in its own nature, very different from ſlavery. And as it is diſtinguiſhed from ſlavery by its nature, ſo likewiſe it is by its duration. The maſters power over the ſlave is perpetual: the parents authority over the child ceaſes; when the child is able to think and to act for itſelf.

But if neither ſuperiour underſtanding, nor ſuperiour ſtrength, nor parental authority, is a natural foundation of deſpotiſm; we may ſafely conclude, that no man is naturally a ſlave: for there does not appear any other condition of human nature, which can poſſibly be imagined to give one man ſuch an abſolute right over another, as is implyed in the notion of deſpotiſm.

We may form a general argument to ſhew, that nature gives no man a juſt title to deſpotiſm, upon the principles already made uſe of to ſhew, that no juſt title to it can ariſe from a ſuperiority in bodily ſtrength. If nature has made any thing a mans own, his mind and his body are ſo. At leaſt it is evident, that whatever right one man has in his mind and body, another man muſt have the ſame right in his; that is, as far as we can judge from any appearance in nature, each man has an equal right in his own mind and body reſpectively. But no mans mind and body can be his own, unleſs the faculties of both, that is, his judgment, his will, and his powers of acting are ſo. Now he, who has a right in his faculties of judging of chuſing and of acting, is no ſlave. And ſince nature, which gave every man a right in his own mind and body, gave him a right likewiſe to theſe faculties; the conſequence is, that nature has not placed any man in a ſtate of ſlavery.

IV.

Cauſes of ſlavery.

IV. But ſlavery, though it is not the natural ſtate of any man, may be introduced conſiſtently with the law of nature. Firſt; a man may come into a ſtate of ſlavery through the act of his parents. The law of nature obliges the parents to maintain their child. But it is poſſible for them to be in ſo low a condition, as to be abſolutely unable to diſcharge this duty in their own perſons, and to be under a neceſſity either of ſuffering the child to periſh, or of procuring ſome other perſon to diſcharge it for them. In theſe circumſtances, if civil laws had made no better proviſion, the law of nature ſeems to allow them rather to put the child into the hands of any one, who would upon his own terms undertake to preſerve its life, than to ſuffer it to periſh for want of common neceſſaries. Nature indeed gave the parents authority over the child in view to the childs benefit: and he, who undertakes to maintain it and bring it up, upon condition of its being his ſlave, has his own benefit principally in view. It may therefore well be aſked, whether the parents have authority to diſpoſe of the child upon theſe terms. To this it may be anſwered, that the parents, through want and infirmity, being under a neceſſity of leaving their child to ſtarve, or of accepting theſe conditions, provide for its benefit, as well as they can, by delivering it up to any perſon, who will undertake to ſubſiſt it, even upon the condition of its being bound to act for his benefit, as long as it lives. There may however be a farther queſtion, how it is poſſible for the temporary right of the parent over the child, to produce a perpetual right in the maſter over it as a ſlave. And undoubtedly, if there was no other cauſe of the maſters power beſides the parents act, the ſlavery of the child would

would ceaſe, when it comes to years of diſcretion. As the authority of the parent ceaſes at that age, the power of the maſter, if it was derived ſolely from that authority, could ſubſiſt no longer. But the maſter undertakes from the firſt to maintain the child, in view to his own benefit; and conſequently its maintenance is not to be conſidered as a bounty beſtowed upon it by the maſter. If then he does not give the child its maintenance, the child muſt be his debtor for ſuch maintenance: and, upon account of this debt, he claims a right to direct its future actions for his own benefit. Nor will the labour of the child, after it is grown up, diſcharge this debt, ſo as to redeem it from ſlavery: becauſe its future labour will be due to its maſter for its future ſubſiſtance: and the original debt will upon this account ſtill remain unſatisfyed. This original debt may indeed be greater, than what ariſes from barely maintaining the child, whilſt it was unable to work: for as the parents, though they were under a neceſſity of diſpoſing of their child to ſome one, were at liberty to diſpoſe of it to whom they pleaſed; the maſter may have given them money to engage them to let him have the child, rather than any other perſon. And whatever he has thus paid to the parents is to be placed to the childs account, and becomes a part of the debt, which it owes to the maſter.

We may obſerve by the way, that when we ſpeak of parents ſelling their child into ſlavery, nothing more can be meant by it, than that the purchaſer, as we call him, gives the parents ſome valuable conſideration to engage them to let him, rather than any other perſon, acquire a right to the ſervice of the child, by maintaining it in its infancy, whilſt it is unable

ble to earn its own living. For certainly as the child is not a ſlave to its parents, they can have no immediate right of making it a ſlave to any one elſe: nor can they, properly ſpeaking, ſo ſell it, as that the purchaſer ſhall immediately by their act acquire a right to direct all the actions of the child for his own benefit.

Secondly, ſlavery may ariſe from a mans own conſent. As the law of nature allows him to give another a temporary right to direct him in ſome of his actions by contract or agreement; ſo it will be difficult, if not impoſſible, to prove, that the ſame law does not allow him to make this right perpetual, and to extend it to all his actions. It is not very material to enquire whether any perſon has ever conſented thus to part with his liberty: we are rather concerned to know what may be done of right, than what has been done in fact. And as every right, which a man is poſſeſſed of, may be alienated, if no law forbids him to alienate it; we may venture to conclude, that his liberty is alienable, in whole as well as in part, unleſs ſome law of nature could be produced, which, though it allows him in numberleſs inſtances to let out his ſervice for hire, yet forbids him to make a ſlave of himſelf. It may perhaps be urged, that deſpotiſm implys a right to diſpoſe of the life of the ſlave at pleaſure, and to compel him to do ſuch actions as the law of nature forbids; and that conſequently, as no man has a right to diſpoſe of his own life, or to do what is unlawful, he cannot give any one elſe ſuch an authority over him, as is implyed in the notion of deſpotiſm. But the ready way of anſwering this objection is to deny the firſt principle, that it proceeds upon. Deſpotiſm does not imply a right either to diſpoſe of the ſlaves life at

pleaſure,

pleaſure, or to compel him to do what the law of nature forbids. And the reaſon, why it does not imply ſuch a right, is the ſame, which the objectors here give: no man is at liberty to diſpoſe of his own life at pleaſure, or to act contrary to the law of nature; and conſequently no man can put his life into the arbitrary diſpoſal of any one elſe, or ſubject himſelf to be compelled to do what the law of nature forbids. But though a man cannot alienate a liberty, which he has not, it does not follow, that he cannot alienate a liberty which he has. And he who has alienated all the liberty, which he has, to ſome other perſon, makes himſelf a ſlave; whilſt he, to whom it is ſo alienated, acquires ſuch an abſolute authority, as we call deſpotiſm.

Thirdly; ſlavery may ariſe from damages done; where the perſon, who did it, has no other way of making reparation. The obligation to make reparation operates like a debt, and gives the creditor a right to direct all the actions of him, who has done the damage, to his own benefit; if this is the only way, in which he can obtain ſatisfaction for the damage ſuſtained. But ſuppoſe the debtors labour will be of no uſe to the creditor, yet the obligation to make reparation will ſtill ſubſiſt: and if this obligation can be ſatisfyed in any other way, either in whole or in part, the creditor has a right to demand ſuch ſatisfaction. Now though the debtors labour would be of no ſervice to the creditor himſelf, yet it may be ſerviceable to ſome other perſon, who would be willing to pay for a right to demand this labour. And as the creditors damages may, at leaſt in part, be repared, though not by uſing the debtor as his own ſlave, yet by ſelling him for a ſlave to the perſon, who wants him; the right to

demand reparation would for this reaſon terminate in a right ſo to ſell the debtor; where this is the only way, in which the creditor could obtain any reparation.

Fourthly; ſlavery may be produced by guilt, conſiſtently with the law of nature. Amongſt the other methods of reſtraining a criminal from offending again, this is one: he will have few opportunities of offending, where all his actions are under the abſolute authority and control of another. And this loſs of liberty may be either temporary or perpetual, according as the guilt of the criminal deſerves a leſs or a greater penalty. The puniſhment of a criminal may likewiſe end in ſlavery, where the guilt is ſuch as to deſerve death. They, who are to puniſh him, may, if they find it proper, remit the rigour of the penalty, and give him his life, upon condition of his becoming their ſlave.

Limitations of deſpotiſm.

V. From whichever of theſe cauſes ſlavery begins, it does not appear, that the maſter, merely upon account of that right, which we call deſpotiſm, has a right to diſpoſe of the ſlaves life at pleaſure.

When ſlavery is derived from the act of the ſlaves parents; it is certain, that act cannot immediately and in itſelf, give the maſter any arbitrary right over the life of the ſlave. The parents themſelves had originally no right of this ſort: and they cannot give a right to another, which they themſelves never were poſſeſſed of. Perpetual ſlavery, where the parents ſell the child, is produced indeed, as we have juſt now ſeen, not by the immediate act of the parents, but by the debt, which the child contracts, before it is able to earn its livelihood. And that this debt cannot give the maſter any power to diſpoſe of the ſlaves life at pleaſure, will planely appear, when we have conſidered the

effect

effect of ſlavery, ariſing from damage done or a debt contracted.

Secondly; ſlavery, ariſing from a mans own conſent, gives the maſter no abſolute power over the life of the ſlave. The ſlave could not by his own act give the maſter any power, which he himſelf was not poſſeſſed of; and no man has a right to diſpoſe of his own life at pleaſure.

Thirdly; though damages done or debts contracted, as they give the creditor a right to every valuable conſideration in the debtors power, may by this means end in ſlavery; yet they give the creditor no abſolute right over the life of the debtor. His life is indeed a valuable conſideration to himſelf: if he loſes it, he loſes what is of the greateſt value to him. But it is no valuable conſideration to the creditor; that is, the creditor by taking it from him would gain nothing. The law of nature therefore, notwithſtanding it gives the creditor a right to whatever may ſatisfy his demand, can give him no right to the life of his debtor. He has a claim to whatever he can get from the debtor, which may be beneficial to himſelf, till his damages are fully repared. But then his claim extends no farther: it does not extend to a right of taking what the debtor will be hurt by loſing; if what is ſo taken will not help towards making him amends for the damages, which he has ſuſtained. One might here aſk, how the impriſonment of a debtor, for no uſe or purpoſe whatſoever, can be reconciled to the law of nature. He may indeed loſe his liberty by being confined to work for the benefit of his creditor: becauſe this is an amends for the damages, which he has done, or for the debt, which he owes. But the loſs of liberty, if

it is merely confinement in a priſon, is no more a ſatisfaction for damages, than the loſs of life would be. Where men live in civil ſociety, if the debt by the inſtituted laws of the ſociety will not give a full claim upon the debtors lands, but only upon his moveable goods; in theſe circumſtances, if the debtor has no moveable goods, and refuſes to pay out of his lands what he owes; impriſonment may be a very proper way to bring him to a proper ſenſe of his duty, and to make him willing to give up his lands in payment. But if he has neither lands nor moveable goods; ſuch impriſonment ſeems to have but little foundation in natural juſtice. And yet in a country, where ſlavery is unknown, and impriſonment for debt is frequent, the prejudices, that men have been brought up in, will probably make them wonder to hear, that ſlavery is a more natural and a more reaſonable conſequence of damage, or of debt, than impriſonment.

Fourthly; if ſlavery is the puniſhment of a crime, which deſerves no higher puniſhment; the power of the maſter or puniſher ſtops here: it would be unjuſt to inflict death, where the proper puniſhment is ſlavery. The maſter therefore has in this caſe no abſolute right over the life of the ſlave. Indeed where the crime deſerves capital puniſhment, the perſon, who inflicts the puniſhment, has in the firſt inſtance a right over the criminals life to take it away, if he pleaſes. But if he has agreed to mitigate the puniſhment, by changing it into ſlavery, this right is at an end: he parts with this right by conſenting to take the criminal as his ſlave. So that even in this caſe, though the puniſher had originally a right over the life of the criminal, yet the maſter will have no right over the life of the ſlave.

It

It is no objection to what is here advanced, that if a ſlave commits a capital offence, his maſter will have a right to puniſh him with death. This right belongs to him as a man, and not as the maſter of the ſlave. Any one has the ſame right over the ſlave, in this reſpect, that the maſter has: and if the maſter is to be employed, rather than any one elſe, in inflicting the puniſhment; it is only becauſe he has a better opportunity of doing it, than any one elſe, as the ſlave is in his cuſtody.

We need not be particular in proving, what has been mentioned above, that deſpotiſm gives no right to the maſter of compelling the ſlave to do any act, which the law of nature forbids. A mans own conſent, the obligation to repare damages, or the obligation to undergo puniſhment, are the natural occaſions of ſlavery: and it cannot be thought, that the maſter can derive ſuch a right from any of theſe principles. We may indeed prove by a general argument, that it is impoſſible for him to have ſuch a right. The law of nature cannot allow any perſon a right of forcing another to diſobey its own precepts: every pretence therefore of the maſter to ſuch a right is inconſiſtent with the law of nature.

Perfect ſlavery ſeems in its own nature to put an end to property; at leaſt it will make the ſlaves property worth nothing. For if he is bound in all his actions to work for his maſters benefit, if the maſter has a right to direct him to this purpoſe in whatever he does; he can neither keep, nor uſe, nor diſpoſe of any goods, either moveable or immoveable, for his own benefit, or at his own diſcretion, but only for the benefit and at the diſcretion of his maſter.

However, if his maſter has allowed him to have property; his property held under ſuch allowance is not rendered precarious, merely by his being a ſlave. The goods, which he has acquired, are as much his own to keep, to uſe, and to diſpoſe of, as if he had been free. In effect the allowance of having goods of his own is a grant of ſo much of his liberty as is neceſſary for theſe purpoſes: the very notion of his having property in ſuch goods implys, that he has this liberty in its fulleſt extent; unleſs the maſter, when he allowed him to have goods of his own, has made ſome expreſs reſerve, ſo as to abridge this liberty.

The conſequence of this is, that, when the ſlave dies, he may give his goods away by will; or if inteſtate ſucceſſion has been received in the place where he lives, they will deſcend to his heir, and the maſter will have no claim to them; unleſs he has expreſsly taken care to reſerve ſuch a claim. It may happen indeed, that his children are ſlaves; and for this reaſon are unable to claim either under his will, or in inteſtate ſucceſſion. But then it is their incapacity, which prevents them from claiming, and not any defect in his right, to whom the goods belonged.

Slavery how the conſequence of juſt war.

VI. From what has been ſaid concerning the origin of ſlavery, we may ſee in what manner it may ariſe from a juſt war.

It is lawful to make uſe of force either to recover ſatisfaction for damages ſuſtained, or to inflict puniſhment upon ſuch as have deſerved to be puniſhed. And ſince the ſlavery of the party, who has done the injury may be the only ſatisfaction, that can be obtained for the damage, which he has done, or may be the proper puniſhment

puniſhment of his guilt, a juſt war may end in ſlavery. Deſpotiſm may thus be the conſequence of conqueſt.

But then the power of the conqueror does not ariſe immediately from conqueſt: he has no right to command the vanquiſhed to act for his benefit, merely becauſe he happens to be ſtronger than they are, and has ſubdued them. Thoſe, who call war an appeal to [n] heaven, have given too much countenance to this opinion. It is obvious to conclude, if war is an appeal to heaven, that victory is a divine deciſion in favour of the conqueror: and the probable inference from hence would be, that he has I know not what divine right of deſpotiſm over the vanquiſhed, without conſidering whether he had any original right to make uſe of force at all. Whereas in truth, though deſpotiſm may follow victory, the right of the conqueror over the vanquiſhed does not ariſe immediately from victory: he muſt have had this right before, or his ſuperiour ſtrength could never have given him it. All that his ſtrength can do is to enforce his claim of damages, or his right of puniſhment. This claim or this right might have been unjuſtly prevented from taking place, if his adverſaries had happened to be ſtronger than he is. And if, when it it ſaid, that conqueſt gives a right to deſpotiſm, all that is meant by it is, that it ſupports a right, which might otherwiſe have been hindered from obtaining its effect, the expreſſion muſt be allowed to be at leaſt very inaccurate.

Slavery produced by an unjuſt war is a manifeſt injury, notwithſtanding ſuch war is attended with conqueſt. The ſlaves, however they may be ſubdued, and be forcibly deprived of their liberty, continue in a

[n] Locks works V. II p. 179. 225.

ſtate of war with their conqueror. They have ſtill a right to their liberty, and may aſſert that right, whenever they have an opportunity.

If indeed his victory has been followed by any expreſs agreement between him and them, to confirm to him what, in the firſt inſtance, was obtained unjuſtly; ſuch agreement may be binding. But it will certainly be no otherwiſe binding, than upon ſuppoſition, that the unjuſt force was removed. If the ſame unjuſt force, by which they were ſubdued at firſt, is made uſe of afterwards to extort their conſent, ſuch agreement will be a nullity. An expreſs agreement is neceſſary, even if the unjuſt force is removed: long ſubmiſſion, without any efforts to free themſelves from ſlavery, will not give the conqueror a claim by preſcription; ſince no preſcription can take place, where the original poſſeſſion was unjuſt.

The reader ſhould obſerve, that the war and the deſpotiſm, which we have here been ſpeaking of, are private war in a ſtate of nature, and private deſpotiſm or the power of a maſter over his ſlave. The effects of conqueſt in reſpect of civil power will come more properly under conſideration in another place.

Children of ſlaves why they follow the condition of their mother.

VII. [o] Since liberty is the natural ſtate of mankind, it may be aſked whether the children of ſlaves are free? to which we may anſwer, that if it is otherwiſe; if the children of ſlaves are not free; the ſlavery of ſuch children is not entailed upon them by nature; it is not derived from their parents, as their temper, their conſtitution, or their complexion ſometimes are: ſome other principle, beſides the condition of their parents, will be neceſſary to explane their ſlavery.

[o] Grot. ibid. § XXIX.

If

If the condition of the parent is the occaſion of the childs ſlavery, it is only the remote occaſion of it; ſome other accident is the immediate cauſe, which deprives them of their liberty. When a child, which has been ſold by its parents, is grown up and is itſelf become a parent, its offſpring, unleſs diſpoſed of in the ſame manner as the parent was, is not affected by what was done long before its birth, and ſo done as not to include its liberty in the bargain.

When a man enſlaves himſelf, Grotius contends, that he may at the ſame time enſlave his future children, if he has no other poſſible way of providing for them. But then thoſe children are ſlaves; not merely becauſe their parents are ſo, nor indeed becauſe their parents have thus diſpoſed of them; but by another accident, which has been already explaned at large. However, ſlavery thus produced muſt ſtop here: the childrens children will not be affected by what has paſſed between the maſter and their remote parents; and in reſpect of them the queſtion will return, whether they are ſlaves or not; and if they are, what made them ſo?

Thus ſlavery ariſing either from the act of a mans parents, or from his own act, will not deſcend to his remote offspring: and much leſs will it deſcend to them, when it is a ſatisfaction made for damages, which he has done, or a puniſhment of any crime, which he has committed. The child of a man, who has injured another, may be bound to make reparation; becauſe the obligation to make reparation affects, not only the perſon, but the goods likewiſe of him, who did the damage; and the child by taking the goods is involved in all the obligations, with which thoſe goods

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are charged. But where there are no goods, or what goods there are will not be ſufficient to make reparation; that is, as far as the obligation affected only the perſon of him, who did the damage, ſo as to ſubject him to ſlavery; the child, if it was neither a principal nor an acceſſory, is no way involved in that obligation. We have ſeen, upon another occaſion, that guilt is a perſonal quality; and conſequently, that, if the child ſtands clear of the parents guilt, it cannot juſtly ſhare in the ſlavery, or in any other puniſhment, which is inflicted on the parent.

Nor can it here be objected; that, as the child may juſtly loſe thoſe goods, which, if the parent had not been deprived of them, would have deſcended to it; ſo it may for the ſame reaſons be deprived of that liberty, which, if the parent had been innocent, would have been its birthright. Theſe two caſes are widely different from one another. Liberty is the childs right; the parents goods are only its conditional expectancy. Though we may therefore juſtify cutting off the childs expectancy, where it had no right; we cannot, upon the ſame principles, nor upon any other, juſtify taking from it what is properly and ſtrictly its own.

If then none of all the ways, by which deſpotiſm over the parents is acquired, will naturally affect the children, we are ſtill to enquire by what accident the ſlavery of the parent ſhould make them ſlaves. Grotius, to make this enquiry more eaſy, ſuppoſes both the parents to be ſlaves. The child then, he ſays, as ſoon as it is born, is maintained at the expence of their maſter, before it is able to earn its own livelihood by its work. By this maintenance the child contracts a debt, which

which its future work cannot diſcharge; becauſe its future work will be due for its future maintenance. This debt therefore will remain as long as it lives, and will give the maſter of the parents a right to every valuable conſideration in the childs power.

Our authors principle, as here explaned, may perhaps account for the childs ſlavery, after it is once in the maſters power. But the enquiry may be carried one ſtep farther back, by aſking, how the child comes to be a ſlave rather to the maſter of the parents, than to any other perſon; ſince any other perſon ſeems to have as good a claim, upon this principle, as he has, to undertake the maintenance of the child in view to the benefit, which may ariſe from its ſervice? And in truth, Grotius has not ſhewn, either that the maſter of the childs parents, or that any other perſon has ſuch a claim. As far as appears from what he lays down as the foundation of the childs ſlavery, it is as much in a ſtate of freedom at the time of its birth, as it would have been upon ſuppoſition, that neither of the parents were ſlaves.

We cannot indeed maintain on the contrary, that the children of ſlaves are naturally born ſlaves: but there ſeems to be an accident previous to their birth, which fixes them to this condition. If the mother is a ſlave, her owner, during the time of geſtation, and during the time of her illneſs occaſioned by the birth, loſes her work, and is likewiſe at an extraordinary expence in taking care of her. As this loſs and theſe expences are owing to the child, they make it from its birth a debtor to the mothers maſter; and upon this account he has an immediate claim to every valuable

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conſideration, that he can receive from the child, as far as this debt extends. It is a ſlave therefore from the beginning, not becauſe the ſlavery of the parent naturally entails ſlavery upon it, but becauſe the ſlavery of the mother made the child from the beginning a debtor to her owner.

The original debt is indeed encreaſed by its maintenance during its infancy: and in this reſpect the principle laid down by Grotius has ſome effect in its future ſlavery: though this principle is not ſufficient in itſelf to explane the occaſion of its coming at firſt into this ſtate.

From hence we may ſee the reaſons why the offſpring ſhould naturally follow the condition of the mother, and not of the father: why, if the mother is a ſlave, the child will be ſo, though the father is free; and why if ſhe is free, the child will be ſo, though he is a ſlave. For if ſhe is free, no one has any property in her work, nor is put to any extraordinary expence upon her account, ſo as to acquire any original claim upon the child. In another reſpect likewiſe the child follows the mother: it belongs to her maſter, if ſhe and the father are both ſlaves, and have different maſters. For the loſs of her work and the extraordinary expence, which the child occaſions, during the time of geſtation and birth, fall upon the maſter of the mother and not upon the maſter of the father.

It was neceſſary to ſay thus much concerning ſlavery, that we may be enabled in the following book to diſtinguiſh this ſort of ſubjection from civil ſubjection, and private deſpotiſm from civil power.

We

We have been hitherto employed in conſidering the rights and obligations of mankind, the principles from whence they are derived, and the rules, by which they are governed, in the liberty of nature. And though mankind are at preſent united into diſtinct civil communities, yet theſe points are not now become matter of mere ſpeculative amuſement, but are ſtill as neceſſary to be known, in order to aſcertain our reſpective rights and obligations, as if we had continued to live in a ſtate of nature.

For firſt; though mankind are now united into civil communities, and are become ſubject to the poſitive laws of ſuch communities, ſo that theſe laws are in moſt inſtances the ſupport of their rights, and the meaſure of their obligations; yet all mankind are not united into one and the ſame civil community; they are not all ſubject to the ſame poſitive laws; and conſequently theſe laws cannot aſcertain all their claims, or regulate their conduct in all inſtances. Not only different civil ſocieties, when each ſociety is conſidered as one collective perſon or body politic, but likewiſe individuals, who are members of different civil ſocieties, are ſtill in the liberty of nature, and muſt have recourſe to that law of nature, which reſpects mankind, as they are individuals, in order to determine what is juſt and fit to be done in reſpect of one another.

Secondly; even they, who are members of the ſame ſociety are upon many occaſions left to their natural liberty: ſometimes becauſe the civil laws of that ſociety, either through their ſilence or their imperfection, have not provided for the caſe in queſtion: ſometimes becauſe

cauſe either an expreſs or an equitable permiſſion has replaced them, as it were, in a ſtate of nature, and given them leave to defend themſelves, when the danger, which threatens them, is ſo imminent, as to make it impoſſible for the civil laws to come in to their aſſiſtance: ſometimes becauſe the civil laws, from the apprehenſion that ſome rights, which are acquired conſiſtently with the law of nature, might be abuſed, would ſet ſuch rights and their correſpondent obligations aſide, provided the perſons ſo obliged think proper to be releaſed from them: but thoſe perſons are left in the mean time to judge for themſelves, whether in good conſcience they ought to comply with ſuch obligations or not.

Thirdly; civil laws are in ſome particulars tranſcripts of the law of nature; they are only ſuch rules, as individuals, in the liberty of nature, are obliged to obſerve in their conduct towards one another. An acquaintance therefore with theſe rules will be of great uſe towards enabling us to underſtand ſuch laws rightly and to apply them properly.

Fourthly; in interpreting and applying civil laws, when they are not mere tranſcripts of the law of nature, as it reſpects individuals in a ſtate of natural liberty, a thorough knowledge of this law is commonly neceſſary: becauſe though ſuch civil laws derive their obligation from civil authority; yet this authority does not always ſettle the preciſe manner of their operation in each particular caſe, but leaves them to operate according to the nature and reaſon of things.

Fifthly;

Fifthly; as the authority, by which civil laws themſelves are eſtabliſhed, is derived from the conſent of thoſe, who are ſubject to ſuch laws; it will be neceſſary to inform ourſelves of the rights and obligations of mankind, as they are individuals; not only that we may trace out the origin of this authority, but that we may underſtand the nature and ſettle the extent of it, may determine what adventitious rights and obligations are introduced, what original rights and obligations are either ſuperſeded or altered, and in what manner either of theſe effects are naturally produced by it.

THE END.



BOOKS written by the Rev. Dr. *Rutherforth*, and ſold by *William Thurlbourn*.

1. A Syſtem of Natural Philoſophy, 2 vol. 4to, being, a Courſe of Lectures in Mechanics, Optics, Hydroſtatics, and Aſtronomy.
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